



## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### 29 CFR Part 2570

#### RIN 1210-ACO5

### Procedures Governing the Filing and Processing of Prohibited Transaction

#### Exemption Applications

**AGENCY:** Employee Benefits Security Administration, U.S. Department of Labor.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document gives notice of a proposed rule that, if adopted, would supersede the Department of Labor's (the Department) existing procedure governing the filing and processing of applications for administrative exemptions from the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA), the Internal Revenue Code of 1986 (the Code), and the Federal Employees' Retirement System Act of 1986 (FERSA). The Secretary of Labor (the Secretary) is authorized to grant exemptions from the prohibited transaction provisions of ERISA, the Code, and FERSA and to establish an exemption procedure to provide for such relief. The proposed rule would update the Department's prohibited transaction exemption procedures.

**DATES:** Written comments and requests for a public hearing on the proposed rule must be submitted to the Department within [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** All written comments and requests for a hearing concerning the proposed rule should be sent to the Office of Exemption Determinations through the Federal eRulemaking Portal and identified by RIN 1210-ACO5.

*Federal eRulemaking Portal:* [www.regulations.gov](https://www.regulations.gov) at Docket ID number: EBSA-2022-

0003. Follow the instructions for submitting comments.

See **SUPPLEMENTARY INFORMATION** below for additional information regarding comments.

**FOR FURTHER INFORMATION CONTACT:** Brian Shiker, telephone: (202) 693-8552, email: shiker.brian@dol.gov, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (this is not a toll-free number).

*Customer Service Information:* Individuals interested in obtaining information from the Department concerning ERISA and employee benefit plans may call the Employee Benefits Security Administration's Toll-Free Hotline, at 1-866-444-EBSA (3272) or visit the Department's website ([www.dol.gov/ebsa](http://www.dol.gov/ebsa)).

**SUPPLEMENTARY INFORMATION:**

***Comment Instructions***

All comments and requests for a hearing must be received by the end of the comment period. Requests for a hearing must state the issues to be addressed and include a general description of the evidence to be presented at the hearing. In light of the current circumstances surrounding the COVID-19 pandemic caused by the novel coronavirus which may result in disruption to the receipt of comments by U.S. Mail or hand delivery/courier, persons are encouraged to submit all comments electronically and not to follow with paper copies. The comments and hearing requests will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW, Washington, DC 20210; however, the Public Disclosure Room may be closed for all or a portion of the comment period due to circumstances surrounding the COVID-19 pandemic caused by the novel coronavirus. Comments and hearing requests will also be available online at [www.regulations.gov](http://www.regulations.gov), at Docket ID number: EBSA-2022-0003 and

[www.dol.gov/ebsa](http://www.dol.gov/ebsa), at no charge.

*Warning:* All comments received will be included in the public record without change and will be made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes information claimed to be confidential or other information whose disclosure is restricted by statute. If you submit a comment, the Employee Benefits Security Administration (EBSA) recommends that you include your name and other contact information, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number), or confidential business information that you do not want publicly disclosed. However, if EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment. Additionally, the [www.regulations.gov](http://www.regulations.gov) website is an “anonymous access” system, which means EBSA will not know your identity or contact information unless you provide it. If you send an email directly to EBSA without going through [www.regulations.gov](http://www.regulations.gov), your email address will be automatically captured and included as part of the comment that is placed in the public record and made available on the Internet.

## ***BACKGROUND***

Part 4 of Title I of ERISA establishes an extensive framework of standards and rules that govern the conduct of ERISA plan fiduciaries; collectively, these rules are designed to safeguard the integrity of employee benefit plans. As part of this structure, ERISA section 406(a) generally prohibits a plan fiduciary from causing the plan to engage in a variety of transactions with certain related parties, unless a statutory or administrative exemption applies to the transaction. These related parties (which include plan fiduciaries, sponsoring employers, unions, service providers, and other persons who may be in a position to exercise improper influence over a plan) are defined as “parties in

interest” in ERISA section 3(14). ERISA section 406(b) generally prohibits a plan fiduciary from (1) dealing with the assets of a plan in his or her own interest or for his or her account, (2) acting in any transaction involving the plan on behalf of a party whose interests are adverse to those of the plan or its participants and beneficiaries, or (3) receiving any consideration for his or her own personal account from a party dealing with the plan in connection with a transaction involving plan assets, unless an exemption specifically applies to such conduct. To supplement these provisions, ERISA sections 406(a)(1)(E) and 407(a) impose restrictions on the nature and extent of plan investments in assets such as “employer securities” (as defined in ERISA section 407(d)(1)) and “employer real property” (as defined in ERISA section 407(d)(2)). The transactions prohibited under ERISA sections 406 and 407 are referred to as “prohibited transactions.”

Most of the transactions prohibited by ERISA section 406 are likewise prohibited by Code section 4975, which imposes an excise tax on those transactions to be paid by each “disqualified person” (defined in Code section 4975(e)(2) in virtually the same manner as the term “party in interest” is defined in ERISA section 3(14)) who engages in the prohibited transactions.

### ***Prohibited Transaction Exemptions***

Both ERISA and the Code contain various statutory exemptions from the prohibited transaction rules. These statutory exemptions were enacted by Congress to prevent the disruption of a number of customary business practices involving employee benefit plans, parties in interest, and fiduciaries. The statutory exemptions afford relief for transactions such as loans to participants and stock ownership plans, the provision of services necessary for the operation of a plan, certain investment advice transactions involving individual account plan participants and beneficiaries, and the investment of plan assets into deposits in certain financial institutions regulated by state or Federal agencies.

In addition to the statutory exemptions, ERISA section 408(a) authorizes the Secretary to grant administrative exemptions from the restrictions of ERISA sections 406 and 407(a) in instances where the Secretary makes a finding on the record that relief is (1) administratively feasible, (2) in the interests of the plan and its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan. Similarly, Code section 4975(c)(2) of the Code authorizes the Secretary of the Treasury or his delegate to grant administrative exemptions from the prohibitions of Code section 4975(c)(1) upon making the same findings. Before an exemption is granted, notice of its pendency must be published in the *Federal Register* and interested persons must be given the opportunity to comment on the proposed exemption. If the exemption transaction involves potential fiduciary self-dealing or conflicts of interest, an opportunity for a public hearing must be provided.

ERISA section 408(a) authorizes the Secretary to grant administrative exemptions on either an individual or a class basis. Class exemptions provide general relief from the restrictions of ERISA, the Code, and FERSA to those parties in interest who engage in the categories of transactions described in the exemption and who also satisfy the conditions stipulated by the exemption. Persons who are in conformity with all the requirements of a class exemption are not ordinarily required to seek an individual exemption for the same transaction from the Department. Individual exemptions, by contrast, involve case-by-case determinations as to whether the specific facts represented by an applicant concerning an exemption transaction as well as the conditions applicable to such a transaction support a finding by the Department that the requirements for relief from the prohibited transaction provisions of ERISA, the Code, and FERSA have been satisfied in a particular instance. While the vast majority of administrative exemptions issued by the Department are the product of requests for relief from individual applicants

or the broader employee benefits community, ERISA section 408(a) also authorizes the Department to initiate exemptions on its own motion.

In considering individual exemption requests from applicants, the Department exercises its authority under ERISA section 408(a) by carefully examining the decision-making process utilized by a plan's fiduciaries with respect to an exemption transaction. In general, the Department does not make determinations concerning the appropriateness or prudence of the investment proposals submitted by exemption applicants. However, the Department ordinarily will not give favorable consideration to an exemption request if the Department believes that the proposed transactions are inconsistent with the fiduciary responsibility provisions of ERISA sections 403 and 404. To protect plans and their participants, the Department requires that an exemption transaction be designed to minimize the potential for conflicts of interest or self-dealing. Moreover, the structure of the transaction under consideration should preclude unilateral action by the applicant that could disadvantage the plan.

#### ***Prohibited Transaction Exemption Procedure***

ERISA section 408(a) and Code section 4975(c)(2) direct the Secretary and the Secretary of the Treasury (the Secretaries), respectively, to establish procedures for granting administrative exemptions. In connection with this directive, ERISA section 3003(b) directs the Secretaries to consult and coordinate with each other with respect to the establishment of rules applicable to the granting of exemptions from the prohibited transaction restrictions of ERISA and the Code. Further, under ERISA section 3004, the Secretaries are authorized to develop rules on a joint basis that are appropriate for the efficient administration of ERISA.

Pursuant to these statutory provisions, the Secretaries jointly issued an exemption procedure on April 28, 1975 (ERISA Procedure 75-1, 40 FR 18471, also issued as Rev. Proc. 75-26, 1975-1 C.B. 722). Under this procedure, a person seeking an exemption

under both ERISA section 408(a) and Code section 4975 was obliged to file an exemption application with both the Internal Revenue Service (IRS) and the Department. However, requiring applicants to seek exemptive relief for the same transaction from two separate Federal departments soon proved administratively cumbersome.

To resolve this problem, section 102 of Presidential Reorganization Plan No. 4 of 1978 (3 CFR, 1978 Comp., p. 332), reprinted in 5 U.S.C. app. at 672 (2006), and in 92 Stat. 3790 (1978)), effective on December 31, 1978, transferred the authority of the Secretary of the Treasury to issue exemptions under Code section 4975, to the Secretary with certain enumerated exceptions. As a result, the Secretary possesses authority under Code section 4975(c)(2) and ERISA section 408(a) to issue individual and class administrative exemptions from the prohibited transaction restrictions of ERISA and the Code. The Secretary has delegated this authority, along with most of the Secretary's other responsibilities under ERISA, to the Assistant Secretary of Labor for the Employee Benefits Security Administration.<sup>1</sup>

FERSA also contains prohibited transaction rules similar to those found in ERISA and the Code that are applicable to parties in interest with respect to the Federal Thrift Savings Fund established by FERSA. The Secretary is directed under FERSA to prescribe, by regulation, a procedure for granting administrative exemptions from certain of those prohibited transactions.<sup>2</sup> The Secretary also delegated this rulemaking authority under FERSA to the Assistant Secretary of Labor for the Employee Benefits Security Administration.<sup>3</sup>

Over time, the Department has issued additional guidance explaining its policies and practices relating to the consideration of exemption applications. In 1985, the Department published a statement of policy concerning the issuance of retroactive

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<sup>1</sup> See Secretary of Labor's Order 6-2009, 74 FR 21524 (May 7, 2009).

<sup>2</sup> 5 U.S.C. section 8477(c)(3).

<sup>3</sup> See Secretary of Labor's Order 6-2009, 74 FR 21524 (May 7, 2009).

exemptions from the prohibited transaction provisions of section 406 of ERISA and section 4975 of the Code (ERISA Technical Release 85-1, January 22, 1985). This statement noted that in evaluating future applications for retroactive exemptions, the Department would ordinarily take into account a variety of objective factors in determining whether a plan fiduciary had exhibited good faith conduct in connection with the past prohibited transaction for which relief is sought (such as whether the fiduciary had utilized a contemporaneous independent appraisal or reference to an objective third-party source, e.g., a stock exchange, in establishing the fair market value of the plan assets acquired or disposed of by the plan in connection with the transaction at issue). However, while noting that the satisfaction of such objective criteria might be indicative of a fiduciary's good faith conduct, the release cautioned that the Department would routinely examine the totality of facts and circumstances surrounding a past prohibited transaction before reaching a final determination on whether a retroactive exemption is warranted.

In 1990, the Department published a final regulation (29 CFR 2570.30 through 2570.52 (1991), reprinted in 55 FR 32847 (August 10, 1990)), setting forth a revised exemption procedure that superseded ERISA Procedure 75-1 (the Exemption Procedure Regulation). This regulation, which became effective on September 10, 1990, reflected the jurisdictional changes made by Presidential Reorganization Plan No. 4 and extended the scope of the exemption procedure to applications for relief from the FERSA prohibited transaction rules. In addition, the Exemption Procedure Regulation codified various informal exemption guidelines developed by the Department since the adoption of ERISA Procedure 75-1.

In 1995, the Department issued a publication entitled "Exemption Procedures under Federal Pension Law" (the 1995 Exemption Publication). In addition to providing a brief overview of the exemption process, the 1995 Exemption Publication included



definitions of technical terms such as “qualified independent fiduciary,” “qualified independent appraiser,” and “qualified appraisal report.” These definitions, derived from conditions contained in previously granted exemptions, provide important guidance about the Department's standards concerning the independence, knowledge, and competence of third-party experts retained by a plan to review and oversee an exemption transaction, as well as the contents of the reports and representations the Department ordinarily requires from such experts.

Most recently, the Department published an updated Exemption Procedure Regulation in 2011 (29 CFR 2570.30 through 2570.52 (2011)).<sup>4</sup> The updated Exemption Procedure Regulation revised the prohibited transaction exemption procedure to reflect changes in the Department's exemption practices since the previous exemption procedure was issued in 1990. Among other things, the Department consolidated elements of the exemption policies and guidance previously found in ERISA Technical Release 85-1 and the 1995 Exemption Publication within a single, comprehensive final regulation. The updated Exemption Procedure Regulation promoted the prompt and efficient consideration of all exemption applications by (1) clarifying the types of information and documentation generally required for a complete filing, (2) affording expanded opportunities for the electronic submission of information and comments relating to an exemption, and (3) providing plan participants and other interested persons with a more thorough understanding of the exemption under consideration.

### ***Proposed Changes to the Exemption Procedure Regulation***

The current Exemption Procedure Regulation consists of 23 individual sections (§§ 2570.30 through 2570.52) arranged by topic that generally reflect the chronological order of the steps the Department takes to process an exemption application. This proposed revision to the Exemption Procedure Regulation retains the current section-by-

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<sup>4</sup> 76 FR 66637 (October 27, 2011).

section topical structure and most of the operative language. The Department made some proposed changes to the Exemption Procedure Regulation to improve its readability and other substantive amendments that are discussed below. The Department requests comments on these changes, particularly whether the changes improve the clarity of the procedure and whether additional clarifying edits would be useful. As discussed throughout this preamble, the Department is interested in how its process may better allow the Department to ensure administrative prohibited transaction exemptions satisfy the applicable statutory criteria.

#### *Section 2570.30*

Section 2570.30 sets forth the scope of the Exemption Procedure Regulation. It addresses filing and processing of applications for both individual and class exemptions that the Department may propose and grant pursuant to ERISA section 408(a), Code section 4975(c)(2), FERSA, and on its own motion. Paragraph (b) broadly addresses the Department's power to issue exemptions. The proposal revises the text that is applicable to retroactive exemptions by including a statement that the Department will, among many other things, review any retroactive exemption application to determine whether any plan participants or beneficiaries were harmed by the transaction for which retroactive relief is sought. This language reinforces the Department's existing policy that it, generally, will not support a request for a retroactive exemption involving a transaction that negatively impacted participants and beneficiaries. Further, the Department emphasizes in the amended text that it will apply a high level of scrutiny to any retroactive exemption application using longstanding standards that have been previously set forth by the Department in the Exemption Procedure Regulation. As a result, the Department strongly suggests that a party that anticipates engaging in a transaction that would require exemptive relief should contact the Department before engaging in the transaction.

Paragraph (e) addresses oral requests for exemptions. Generally, the Department will not accept oral exemption applications or orally grant exemptions. The proposal revises the regulatory text to clarify that the Department will provide feedback to oral inquiries but will not be bound by that feedback. However, any statements made by the party making the inquiry will become part of the administrative record.

Finally, the proposal adds a new paragraph (g), which provides that the Department issues administrative exemptions at its sole discretion based on the statutory criteria set forth in ERISA section 408(a) and Code section 4975(c)(2). In conjunction with this amendment, the proposal states that the existence of previously issued administrative exemptions is not determinative of whether the Department will propose future exemption applications with the same or similar facts, or whether a proposed exemption will contain the same conditions as a similar previously issued administrative exemption. The addition of this language reinforces that Department's existing policy that it has the sole discretionary authority to issue exemptions and is not bound by facts or conditions of prior exemptions in making determinations with respect to an exemption application. This policy allows the Department to retain sufficient flexibility to grant exemptions that are appropriate in an ever-changing business, legislative, and regulatory policy environment.

#### *Section 2570.31*

Section 2570.31 sets forth definitions that are used throughout the Exemption Procedure Regulation. While most of the definitions have not been revised other than to improve readability, the Department has made substantive revisions to several existing definitions and added new definitions. The changes are proposed to address issues that the Department has often experienced in its regular review of exemption applications. The Department requests comments on these revisions, including whether these proposed changes are clear, appropriately reflect the manner in which entities interact with ERISA-

covered plans and plan participants and beneficiaries, and assist the Department in making its statutory finding.

First, the proposal revises the definition of “affiliate” set forth in paragraph (a) to include: (1) any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person. For purposes of this paragraph, the term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual; any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)) of any such person; or (2) any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, partner, or five percent or more owner. The revision reflects the definition of affiliate the Department commonly uses in most recent individual and class exemptions. In addition to rewording the text for clarity, the revised definition includes all employees and officers, rather than those who are highly compensated (as defined in Code section 4975(e)(2)(H) or have direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets involved in the subject exemption transaction. This change will help the Department more accurately identify whether a particular transaction involves conflicts of interest.

The proposal also revises the definition of the term “qualified independent appraiser” in paragraph (i). The amended definition defines a qualified independent appraiser as any individual or entity with appropriate training, experience, and facilities to provide a qualified appraisal report on behalf of the plan regarding the particular asset or property appraised in the report that is independent of and unrelated to any party involved in the exemption transaction (as defined in paragraph (l)). The Department determines the independence of the appraiser based on all relevant facts and circumstances. In making this determination, the Department will take into account the amount of the appraiser's revenues and projected revenues for the current Federal income

tax year (including amounts received for preparing the appraisal report) that will be derived from parties involved in the exemption transaction relative to the appraiser's revenues from all sources for the appraiser's prior Federal income tax year and the appraiser's projected revenue for the current Federal income tax year as well as the appraiser's related business interests. An appraiser will not be treated as independent if the revenues it receives, or is projected to receive, within the current Federal income tax year from parties involved in the exemption transaction are more than two percent of such appraiser's annual revenues from all sources based upon either its prior Federal income tax year or the appraiser's projected revenues for the current Federal income tax year, unless the Department determines otherwise in its sole discretion.

The proposal also revises the qualified independent appraiser definition to provide that the appraiser must be independent of any potential qualified independent fiduciary in addition to other parties involved in the exemption transaction. The Department added this language to ensure that the appraiser will not be pressured to deliver a valuation reflecting undue influence from the fiduciary.

The Department proposes to revise the definition to clearly limit the amount of present and projected revenue an appraiser may receive from parties involved in the exemption transaction relative to revenues it received from all sources. The Department is proposing to set this limit at two percent determined using prior and projected tax year information; provided, that the Department may, in its sole discretion, determine otherwise. The revision clarifies the method that must be used to calculate the limitation and ensures that all sources of income are included in the analysis. The revised definition also emphasizes the Department's default assumption that a two percent limitation is essential to ensuring the appraiser's independence. These revisions are intended to assist the Department in more accurately identifying potential conflicts of interest that could affect an appraiser's independence.

Further bolstering the independence of the appraiser, the definition of a “qualified appraisal report” in paragraph (h) is revised to require the report to be prepared solely on behalf of the plan, which ensures that the qualified independent appraiser only takes into account the interest of the plan and its participants and beneficiaries when it produces the report.

The proposal revises the definition of a “qualified independent fiduciary” in paragraph (j). A qualified independent fiduciary is defined as any individual or entity with appropriate training, experience, and facilities to act on behalf of the plan regarding the exemption transaction in accordance with the fiduciary duties and responsibilities prescribed by ERISA that is independent of and unrelated to: any party involved in the exemption transaction (as defined in paragraph (l)) and any other party involved in the development of the exemption request. In general, the Department will determine the independence of a fiduciary based on all relevant facts and circumstances. Among other things, the Department will consider whether the fiduciary has an interest in the subject transaction or future transactions of the same nature or type. In making this determination, the Department will also take into account, among other things, the amount of both the fiduciary's revenues and projected revenues for the current Federal income tax year (including amounts received for preparing fiduciary reports) that will be derived from parties involved in the exemption transaction relative to the fiduciary's revenues from all sources for the prior Federal income tax year or the fiduciary's projected revenues from all sources for the current Federal income tax year. A fiduciary will not be treated as independent if the revenues it receives or is projected to receive from parties (and their affiliates) involved in the exemption transaction within the current Federal income tax year are more than two percent of either the fiduciary's annual revenues from all sources based upon its prior year Federal income tax return or the

fiduciary's projected revenue for the current Federal income tax year, unless, in its sole discretion, the Department determines otherwise.

As with the revision to definition of a qualified independent appraiser, the proposal revises the definition of a qualified independent fiduciary to ensure that the fiduciary is truly independent. Thus, the definition is revised to require the fiduciary to be independent not only from parties involved in the exemption transaction but also from any other party involved in the development of the exemption request. The revised language would include persons that are not parties that engage in in the exemption transaction but are otherwise involved in developing the exemption request, such as consultants or advisors that assist a plan sponsor in structuring exemption transactions and submitting exemption applications.

Consistent with this approach, the proposal also revises the independent fiduciary definition to state that the Department will consider whether a fiduciary has an interest in the exemption transaction or in future transactions of the same nature or type in determining whether a fiduciary is independent. This language addresses the Department's concern that a fiduciary may not be independent if it has a business interest in promoting the exemption transaction. For example, a fiduciary may be affected by a conflict of interest if it motivated to use the exemption transaction to promote its fiduciary services to potential clients contemplating similar transactions or if its work with respect to the exemption transaction is connected to a valued relationship with a third party, such as an investment advisor or bank.

Finally, as with the definition of a qualified independent appraiser, the proposal revises the independent fiduciary definition to clearly limit the amount of present and projected revenue that a fiduciary may receive from parties involved in the exemption transaction across all of the fiduciary's related business interests. This Department is proposing to set this limitation at two percent using prior and projected tax year

information; provided, that the Department may, in its sole discretion, determine otherwise. The revision clarifies how the percentage limitation is calculated and ensures that all sources of income are included in the analysis. The revised definition also emphasizes the Department's default assumption that the revenue limitation is essential to ensuring the fiduciary's independence. These revisions would assist the Department in more accurately identifying potential conflicts, and, thereby, provide important information for the Department to assess the independence of the fiduciary involved in the exemption transaction.

The proposal also adds a new definition of "pre-submission applicant" in paragraph (k) that defines a pre-submission applicant as a party that contacts the Department, either orally or in writing, to inquire whether a party with a particular fact pattern would need to submit an exemption application and, if so, what conditions and relief would be applicable. This definition does not include a party that contacts the Department to inquire broadly without reference to a specific fact pattern. The Department is proposing to add this definition to clearly distinguish parties making inquiries that may potentially lead to an exemption application from parties that simply seek non-fact specific guidance. The distinction impacts how the Department addresses the inquiries and whether an administrative record is created.

Paragraph (l) adds a new definition of "party involved in the exemption transaction" that includes the following: (1) a party in interest (as defined in paragraph (f)); (2) any party (or its affiliate) that is engaged in the exemption transaction; and (3) any party (or its affiliates) that provides services with respect to the exemption transaction to either the plan or a party described in (1) or (2). This term replaces the more limited term "party in interest" in multiple places throughout the Exemption Procedure Regulation to more accurately describe parties that have interests in the exemption transaction. The Department believes that parties engaged in the transaction



(and their affiliates) that are not “parties in interest” could have interests and potential conflicts that should be addressed by the Exemption Procedure Regulation. Similarly, the Department proposes to include service providers in the definition to ensure that all parties with interests in the transaction are included.

#### *Section 2570.32*

The proposal makes two revisions to § 2570.32. First, paragraph (a) is revised to describe “persons who may apply for exemption.” The Department is proposing to delete the language in paragraph (a) stating that “the Department will initiate exemption proceedings upon the application of” to clarify that this paragraph addresses only those parties who are permitted to apply for an exemption but does not address whether the Department is required to initiate an exemption proceeding. The decision to initiate an exemption proceeding remains within the Department’s sole discretion.

The second revision addresses the creation of the administrative record, because the start of the exemption application process, whether through a formal application or contact by a pre-submission applicant, is tied to the creation of the administrative record. To reflect the addition of new paragraph (d), the Department has added “and the administrative record” to the title of § 2570.32.

The revision addresses questions applicants have historically asked the Department regarding the creation of the administrative record. Specifically, paragraph (d)(1) provides that the administrative record is open for public inspection, pursuant to § 2570.51(a), from the date an applicant or pre-submission applicant provides any information or documentation to the Office of Exemption Determinations. In the past, some applicants were uncertain regarding when the administrative record was available for public review. The proposal’s language sets forth the Department’s longstanding position that the administrative record is always available for public review, because the exemption process is open, transparent, and subject to public scrutiny at all times.

Paragraph (d)(2) provides that the administrative record includes, but is not limited to, the following items: (1) any documents submitted to, and accepted by, the Department before the initial application, whether provided in writing by the applicant or pre-submission applicant or notes taken by the Department at a pre-submission conference; (2) the initial exemption application and any modifications or supplements thereto; (3) all correspondence with the applicant or pre-submission applicant, whether before or after the applicant's submission of the exemption application; and (4) any supporting information provided by the applicant or pre-submission applicant orally or in writing (as well as any comments and testimony received by the Department in connection with an application). Importantly, the language specifically includes all information provided by a pre-submission applicant, whether in writing or orally. The pre-submission information is included in the record because if a pre-submission applicant pursues an application, the information provided by the applicant before submitting its application will ultimately inform the Department's decision making with respect to the exemption application. In addition, the Department proposes to clarify that the administrative record only includes information accepted by the Department. If, for example, the applicant submits trade secrets, the Department will reject the information and not include it in the administrative record as discussed in § 2570.33(c).

Finally, paragraph (d)(3) updates the regulation to reflect modern methods of communication. Thus, the paragraph provides that if documents are required to be provided in writing by either the applicant or the Department, the documents may be provided either by mail or electronically, unless otherwise required by the Department at its sole discretion.

#### *Section 2570.33*

In § 2570.33, the Department proposes to revise the regulatory text to clarify situations in which it will not consider an exemption application. The Department

requests comments on these clarifications, including other situations where the Department should or should not consider an exemption application.

First, the Department is proposing to amend paragraph (a)(1) to include applications that fail to include current information to clarify that the Department will treat an applicant's failure to include current information in the same manner as a failure to include information. Absent current information, the Department cannot develop an accurate understanding of the facts underlying an application.

The Department also is proposing to revise paragraph (a)(2), which generally excludes from consideration an application involving: (1) a transaction or transactions that are the subject of an investigation for possible violations of part 1 or 4 of subtitle B of Title I of ERISA or sections 8477 or 8478 of FERSA; or (2) a party in interest who is the subject of such an investigation or who is a defendant in an action by the Department or the IRS to enforce those provisions of ERISA or FERSA.

The proposed revision expands the existing exclusion to include any ERISA investigations (not only Sections 8477 and 8478), as well as investigations under any other Federal or state law. The proposal also expands the limitation on parties that are the subject of an investigation or a defendant in an action brought by the Department or the IRS to include any other regulatory agency enforcing ERISA, the Code, FERSA, or any other Federal or state laws. The proposed expansion of the paragraph addresses the Department's concerns regarding prohibited transactions that are engaged in by bad actors. Before considering an application for a transaction that otherwise is prohibited, the Department must be completely free from doubt regarding the transaction and the motivations of the parties involved in order to make its findings under ERISA section 408(a).

The proposal deletes the language in the current paragraph (c) regarding the administrative record, because that topic is now addressed in proposed revisions to §

2570.32 discussed above. The proposal revises the part of paragraph (c) addressing the submission of confidential information. Currently, the rule provides that if an applicant designates any information required by the rule or requested by the Department as confidential, the Department will determine whether the information is material to the exemption determination. If it determines the information to be material, the Department will not process the application unless the applicant withdraws the claim of confidentiality. The proposal revises this language to clarify that the Department will not review an application that includes confidential information, with an exception for confidential designations by a Federal, state, or other governmental entity. This means that if an applicant submits any confidential information, even outside of the application itself, the Department will not review the information nor process the exemption application. The Department will process that application only after the applicant withdraws its claim of confidentiality or revokes its submission of the confidential information.

The revised language also states that by submitting an exemption application, an applicant consents to public disclosure of the entire administrative record pursuant to § 2570.51. This revision places the applicant on notice that it is consenting to the public disclosure of all information in the administrative record when it submits an exemption application.

In place of the current paragraph (d), the Department is proposing to add a new paragraph (d) that governs communications with pre-submission applicants as newly defined in § 2570.31(k). Paragraph (d) provides that the Department will not communicate with a pre-submission applicant or its representative, whether through written correspondence or a conference, if the pre-submission applicant does not: (1) identify and fully describe the transaction for which exemptive relief is sought; (2) identify the applicant, the applicable plan(s), and the relevant parties to the exemption

transaction; and (3) set forth the prohibited transaction provision(s) that the applicant believes are applicable. This language is proposed to address a recurring problem faced by the Department when a pre-submission applicant seeks informal guidance from the Department while disclosing an incomplete set of facts and later bases its arguments for an exemption on the Department's informal guidance received before the submission. While the Department welcomes pre-submission requests for guidance, it is imperative that parties approaching the Department for such guidance regarding a specific exemption transaction provide the Department with sufficient information to allow it to properly attribute the guidance to a specific pre-submission applicant and determine the transaction for which such guidance is requested and the relevant prohibited transaction provisions that are applicable to the transaction.

#### *Section 2570.34*

Section 2570.34 addresses information the Department requires applicants to include in class and individual exemption applications. The proposal revises § 2570.34 to ensure that the Department receives sufficient information to evaluate an exemption application. While the proposal expands the amount of information the Department would require to be included in an application in some cases, the Department's intention in expanding the required information is to streamline the exemption process by ensuring that most of the information the Department needs to make an exemption determination is available to it when the application is submitted, which will reduce the need for back and forth communication between the applicant and the Department after the application is submitted. The Department requests comments on the proposed revisions, including whether the Department should consider other types of information.

Specifically, paragraphs (a)(1) and (3) are revised to require addresses, phone numbers, and e-mail addresses to be provided for the applicants, representatives, and parties in interest. Requiring this information to be included in the initial application

would ensure that the Department can efficiently contact the proper parties. In addition, the Department is proposing to replace the original paragraph (a)(4) with new paragraphs (a)(4), (5) and (a)(7) to facilitate the Department's understanding of the decision-making process the applicant undertook to determine that it was necessary to submit an exemption application. Accordingly, new paragraph (a)(4) would require the applicant to include in its application a description of: (1) the reason(s) for engaging in the exemption transaction; (2) any material benefit that a party involved in the exemption transaction may receive as a result of the subject transaction (including the avoidance of any materially adverse outcome by a party as a result of engaging in the exemption transaction); and (3) the costs and benefits of the exemption transaction to the affected plan(s), participants, and beneficiaries, including quantification of those costs and benefits to the extent possible. The Department is proposing this language to facilitate its understanding of the underlying rationale for the exemption transaction including the costs and benefits for both the party involved in the transaction and the plan and its participants and beneficiaries. For example, an applicant who is a plan sponsor will need to provide not only a rationale for engaging in the exemption transaction, but also a statement of the costs and benefits to the sponsor, as well as the costs and benefits to the plan.

The Department is proposing to add a new paragraph (a)(5) that builds on paragraph (a)(4) by requiring applicants to provide a detailed description of possible alternatives to the exemption transaction that would not involve a prohibited transaction and why the applicant did not pursue those alternatives. The Department's intention in proposing this language is to require the applicant to evaluate whether the exemption transaction could be structured in a manner that would not result in a prohibited transaction. Structuring a transaction in a manner that is prohibited by ERISA and requires an exemption should not be an applicant's default approach. The Department

believes that an applicant must fully evaluate whether an exemption transaction could be structured in a non-prohibited manner before applying for an exemption that would attain the same results and benefits to the plan and its participants and beneficiaries as the prohibited transaction.

The proposal also inserts a new paragraph (a)(7) that replaces the prior requirement for an applicant to state why the transaction is customary to the industry with a requirement for the applicant to set forth a description of each conflict of interest or potential instance of self-dealing that would be permitted if the exemption is granted. The Department is proposing to make this change, because the prior “customary to the industry” language did not sufficiently inform the Department of the conflicts of interest and instances of self-dealing involved in an exemption transaction or the costs and benefits to a plan and its participants and beneficiaries. The new language would assist the Department in identifying conflicts of interest and instances of self-dealing involved in an exemption transaction, and thereby facilitate the Department’s analysis regarding whether the exemption transaction is structured to properly protect the interest of the plan and its participants and beneficiaries. Together, the proposal’s new paragraphs (a)(4), (5), and (7) would help the Department better understand the proposed transaction and its implications, so that the Department could make the required findings under ERISA section 408(a) as to whether a requested exemption would be (1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries.

The final revisions to paragraph (a) are intended to provide consistency among exemption applications. The revised paragraph (a)(8) simply expands the disclosure requirement by requiring applicants to include in their application a statement regarding whether the transaction is the subject of investigation or enforcement actions by any regulatory authority. This change is consistent with the amendments proposed in §

2570.33 and ensures that the Department has the information it needs to make an informed decision regarding an exemption application.

The proposal's new paragraph (a)(10) would require that if any exemption application uses a definition of the term "affiliate," the applicant include in its application a statement that either (1) the definition of affiliate set forth in § 2570.31(a) is applicable or (2) explains why a different affiliate definition should be applied. The Department believes this language will encourage the use of a single, consistent affiliate definition among all exemptions, when possible. This consistency will allow anyone who reviews an exemption application to more easily compare provisions of different exemptions and prevent the development of unforeseen exemption issues that could result from variations in the definition.

Paragraph (b) addresses some of the Department's specific concerns with respect to exemption transactions. The most substantial change would add proposed paragraph (b)(2)(i), which requires applicants to include a statement that the exemption transaction (A) will be in the best interest of the plan and its participants and beneficiaries; (B) all compensation received, directly or indirectly, by a party involved in the exemption transaction will not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and (C) all of the statements to the Department, the plan, or, if applicable, the qualified independent fiduciary or qualified independent appraiser about the exemption transaction and other relevant matters are not materially misleading at the time the statements are made. Otherwise, the applicant must explain why these exemption standards should not be applicable to the exemption transaction.

For purposes of paragraph (b), an exemption transaction is in the best interest of a plan if the plan fiduciary causing the plan to enter into the transaction determines, with the care, skill, prudence, and diligence under the circumstances then prevailing, that a



prudent person acting in a like capacity and familiar with such matters would, in the conduct of an enterprise of a like character and with like aims, enter into the exemption transaction based on the circumstances and needs of the plan. Such fiduciary shall not place the financial or other interests of itself, a party to the exemption transaction, or any affiliate ahead of the interests of the plan, or subordinate the plan's interests to any party or affiliate

Paragraph (b)(2) generally incorporates compliance with “impartial conduct standards” as formalized in Prohibited Transaction Exemption 2020-02 as a baseline condition for approved exemptions. However, the Department recognizes that impartial conduct standards may not be appropriate or necessary in all exemption transactions. Therefore, paragraph (b)(2) gives applicants an opportunity to affirmatively explain why the impartial conduct standards should not be applicable to their exemption transactions.

Proposed paragraph (b)(4) (previously paragraph (b)(3)) provides that if an advisory opinion has been requested by any party to the exemption transaction from the Department with respect to any issue relating to the exemption transaction, the exemption application must include (1) a copy of the letter concluding the Department’s action on the advisory opinion request; or (2) if the Department has not yet concluded its action on the request, a copy of the request or the date on which it was submitted together with the Department’s correspondence control number as indicated in the acknowledgment letter. The Department is revising this provision for readability and to require an applicant to include with its application any opinion or guidance issued by the Department and any other opinions or guidance issued by Federal, state, or regulatory bodies regarding the exemption transaction. The proposal expands the prior text to ensure that all relevant information regarding the exemption transaction, including guidance issued in connection to the transaction by other Federal, state, or regulatory bodies is available to the Department when making its determination whether to grant an exemption.

The Department proposes to make substantial revisions to the requirements set forth in paragraphs (c) through (f) regarding statements and documents about qualified independent appraisers and qualified independent fiduciaries that are involved in an exemption transaction. The changes relate to the revisions made to the definitions of qualified independent appraiser and qualified independent fiduciary in § 2570.31. Overall, the proposed changes further ensure that the appraiser and fiduciary are independent and that their valuations and oversight over the exemption transaction are reliable and valid.

The proposal's revised paragraph (c) addresses statements and documents included in the application by the qualified independent appraiser. The proposal extends the provisions of paragraph (c) to auditors and accountants. As a result, paragraph (c) would apply to all statements submitted by appraisers, auditors, and accountants to ensure that the Department can rely on financial documents submitted by third parties.

More specifically, the proposal would revise several provisions that govern the information that must be included in any statements submitted in an application by an appraiser, auditor or accountant. First, a new paragraph (c)(1) would be added to require the statements to include a signed and dated declaration under penalty of perjury that, to the best of the qualified independent appraiser's, auditor's, or accountant's knowledge and belief, all of the representations made in such statement are true and correct.

Next, the Department is proposing to expand paragraph (c)(2) to specifically address the contractual obligations of the appraiser, auditor, or accountant. The revised provision requires a copy of the qualified independent appraiser's, auditor's, or accountant's engagement letter and, if applicable, contract with the plan describing the specific duties the appraiser, auditor, or accountant shall undertake to be included with an application. The proposed provision provides that the appraiser, auditor, or accountant's letter or contract may not: (1) include any provision that provides for the direct or indirect

indemnification or reimbursement of the independent appraiser, auditor, or accountant by the plan or another party for any failure to adhere to its contractual obligations or to Federal and state laws applicable to the appraiser's, auditor's, or accountant's work; or (2) waive any rights, claims or remedies of the plan or its participants and beneficiaries under ERISA, the Code, or other Federal and state laws against the independent appraiser, auditor's, or accountant's with respect to the exemption transaction.

Proposed paragraph (c)(2) would prevent appraisers, auditors, and accountants from avoiding accountability to the plan and its participants by relying on indemnification or reimbursement provisions, whether direct or indirect, to avoid financial liability for their failure to comply with their contract or state or Federal law. When parties agree to relieve appraisers, auditors, and accountants from accountability through releases, waivers, and indemnification or reimbursement agreements, they undermine the protective conditions of the exemption, compromise the independence of their services, and cast doubt on the reliability of the service providers' work.

Building on the proposal's theme of independence, paragraph (c)(4) would also be revised to state that submitted documents must contain a detailed description of any relationship that the qualified independent appraiser, auditor, or accountant has had or may have with the plan or any party involved in the exemption transaction, or with any party or its affiliates involved in the development of the exemption request that may influence the appraiser, auditor, or accountant, including a description of any past engagements with the appraiser, auditor, or accountant. The amendment would add a requirement to the current regulatory text requiring the appraiser, auditor, or accountant to provide detailed information regarding relationships with any party or its affiliates involved in the development of the exemption request that may influence it. In addition to this expansion, the relationship disclosure must include past engagements. The Department includes this additional language in order to address instances in which a

party has potentially conflicting relationships because it is dependent on or otherwise regularly involved with parties that develop transactions that may rely on the receipt of exemptions as a part of its business.

The Department is proposing to delete the statement in current paragraph (c)(4)(iii) that requires an applicant to submit a new appraisal to the Department if an appraisal report is one year or more old. This deletion would make clear to applicants that they must submit a current appraisal report with their application, and that the Department would not move forward with its analysis of an exemption transaction without receipt of a recent appraisal report.

The proposal also makes changes in paragraph (c)(8). The revisions are discreet changes that are consistent with the revised definition of a qualified independent appraiser in § 2570.31(i) and describe how the revenue limitations thereunder are calculated.

Specifically with respect to the qualified independent appraiser, the Department proposes to add a new paragraph (d) that would require an applicant to include with its application the following information regarding an appraiser: a statement describing the process by which the independent appraiser was selected, including the due diligence performed, the potential independent appraiser candidates reviewed, and the references contacted; and a statement that the independent appraiser has appropriate technical training and proficiency with respect to the specific details of the exemption transaction. The Department is proposing to add new paragraph (d) to promote a prudent and loyal selection process to hire a qualified independent appraiser. Without such information, the Department has little or no insight into the prudence of the hiring process.

The Department similarly proposes to add a new paragraph (e) that would require applicants requesting an exemption for transactions requiring the retention of a qualified independent fiduciary to represent the interest of the plan, to include a statement that: (1)

describes the process by which the independent fiduciary was selected, including the due diligence performed, the potential independent fiduciary candidates reviewed, and the references contacted; and (2) represents that the independent fiduciary has appropriate technical training and proficiency with respect to ERISA and the Code and the specific details of the exemption transaction to serve as an independent fiduciary. As with paragraph (d), the new paragraph is added to promote a prudent and loyal selection process for a critically important plan service provider.

The Department would revise paragraph (f), which specifies the information an applicant must include in the qualified independent fiduciary's statement required to be submitted with its application. As with the changes to the qualified independent appraiser's statement, the changes to the qualified independent fiduciary's statement are designed to bolster independence and reliability.

Accordingly, paragraph (f)(2) would be revised to provide the applicant must include a copy of the qualified independent fiduciary's engagement letter and contract, which could not: (1) contain any provisions that violates ERISA section 410, which prohibits exculpatory provisions; (2) include any provision that provides for the direct or indirect indemnification or reimbursement of the independent fiduciary by the plan or other party for any failure to adhere to its contractual obligations or to state or Federal laws applicable to the independent fiduciary's work; or (3) waive any rights, claims or remedies of the plan under ERISA, state, or Federal law against the independent fiduciary with respect to the exemption transaction.

The Department has proposed to include new paragraph (f)(2) to ensure that the qualified independent fiduciary remains financially responsible for its own decisions while acting as a fiduciary with respect to the exemption transaction. This limitation extends to any third party retained by the fiduciary in connection with the fiduciary's engagement letter or contract.

In order to ensure that qualified independent fiduciaries have sufficient resources to compensate plans for any losses for which they are liable, the Department proposes to require such fiduciaries to maintain fiduciary liability insurance in an amount that is sufficient to indemnify the plan for damages resulting from a breach by the independent fiduciary of either (1) ERISA, the Code, or any other Federal or state law or (2) its contract or engagement letter under proposed paragraph (f)(3). The insurance may not contain an exclusion for actions brought by the Secretary or any other Federal, state, or regulatory body; the plan; or plan participants or beneficiaries.

The Department understands that some entities that provide ERISA fiduciary services with respect to exemption transactions may not be either sufficiently liquid or capitalized to address liability that might arise in connection with an exemption transaction, especially in light of the proposal's language limiting indemnification, reimbursement, and waivers. Without the addition of paragraph (f)(3), the Department believes that the new provisions in paragraph (f)(2) may not provide the protections to plans and their participant and beneficiaries that the Department intends. By requiring independent fiduciaries to acquire and maintain fiduciary liability insurance, the Department believes the fiduciary is more likely to act prudently when serving as a fiduciary with respect to the exemption transaction, and plans, participants will receive better protection from liability resulting from fiduciary breaches.

The proposal makes additional changes to paragraph (f) to further bolster the qualified independent fiduciary's independence. First, proposed paragraph (f)(6) would expand the existing acknowledgement provision to require the acknowledgement to state that the fiduciary understands its duties and responsibilities under ERISA; is acting as a fiduciary of the plan with respect to the exemption transaction; has no material conflicts of interest with respect to the exemption transaction; and is not acting as an agent or representative of the plan sponsor. The proposal expands the acknowledgement in order

to capture more potential conflicts. Under the proposed amendment, the fiduciary no longer could simply acknowledge that it is an ERISA fiduciary, but would also have to acknowledge that it is acting with respect to the transaction solely in the interest of the plan, not acting on behalf of the plan sponsor, and not subject to conflicts of interest.

The proposal would also revise paragraph (f)(7) to provide that the qualified independent fiduciary certify in writing that the exemption transaction complies with the impartial conducts standards set forth in proposed paragraphs (b)(2)(i)(A) through (C).

Paragraph (f)(9) is revised to reflect the changes to the definition of a qualified independent fiduciary. The changes require additional disclosures regarding the fiduciary's revenue to ensure that the fiduciary meets the terms of the definition.

The proposal adds a new paragraph (f)(10) that would require the qualified independent fiduciary to state that it has no conflicts of interest with respect to the exemption transaction that could affect the exercise of its best judgment as a fiduciary. The requirement would put the fiduciary on the record that it has no conflicts that could impact its judgment and, thereby, promote compliance with the exemption's terms.

The final proposed revisions to paragraph (f) would require the exemption application to address whether the qualified independent fiduciary is under investigation or examination or engaged in any litigation or continuing controversy. Specifically, the fiduciary would be required to state that either, within the last five years, the independent fiduciary has not been under investigation or examination by, and has not engaged in litigation, or a continuing controversy with, the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, the Federal Retirement Thrift Investment Board, or any other Federal or state entity involving compliance with provisions of ERISA, the Code, FERSA, or other Federal or state law; or include a statement describing the applicable investigation, examination, litigation or controversy. The addition of this paragraph ensures that the Department would have full

knowledge of any potential issues or conflicts that involve the fiduciary. Without a full disclosure by the fiduciary with respect to all of items delineated in the paragraph, the Department may not be able to fully evaluate the qualifications and independence of the qualified independent fiduciary and whether the selection of the fiduciary was prudent.

Lastly, a proposed new paragraph (f)(12) would connect with proposed paragraph (f)(11) by requiring the exemption application to include the qualified independent fiduciary's statement either that it has not been either convicted or released from imprisonment, whichever is later, within the last 13 years as a result of: (1) any felony involving abuse or misuse of such person's position or employment with an employee benefit plan or a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime of which any of the foregoing crimes is an element; or any crime described in ERISA section 411 or (2) convicted by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of any crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense described in (1) and a description of the circumstances of any such conviction; or a statement describing a conviction or release from imprisonment described in (1) or (2). As with proposed paragraph (f)(11), the required statement would ensure that the Department has important information relevant to the qualifications and independence of the fiduciary and to the prudence and loyalty of the applicant's selection of the independent fiduciary.



Section 2570.35 addresses information that solely needs to be included in an individual exemption application. As with changes elsewhere in this proposal, multiple changes are made to current § 2570.35 for readability and consistency with changes made in other sections of the Exemption Procedure Regulation. In addition, some minor changes are included in the proposal that would require the mail and e-mail addresses of the plan and parties in interest to which the exemption application applies and a reminder that applicants should not submit social security numbers. The Department requests comments on these changes, including the clarified requirements related to information about previously consummated exemption transactions and criminal convictions.

Beyond those changes, the proposal revises paragraph (a)(6) to more clearly address foreign convictions. While the Department believes the current language includes foreign convictions, the proposal now clearly would require applicants to disclose in their application whether, within the last thirteen years, they or any party involved in the exemption had been convicted by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of any crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense described in paragraph (a)(6)(i) and a description of the circumstances of any such conviction. For purposes of this section, a person shall be deemed to have been “convicted” from the date of the trial court’s judgment, regardless of whether that judgment remains under appeal and the foreign jurisdiction considers a trial court judgment final while under appeal. Clarifying the treatment of foreign convictions serves to remove uncertainty from the exemption application process and ensures that the Department receives all relevant information.

The proposal also revises current paragraph (a)(12), which requires the applicant to state the percentage of plan assets affected by the exemption transaction to provide that if the exemption transaction includes the acquisition of an asset by the plan, the fair

market value of the asset to be acquired must be included in both the numerator and denominator of the applicable fraction. The new language simply clarifies the Department's understanding of how to calculate the fair market value percentage in an acquisition so that the percentage accurately reflects the impact of the exemption transaction on overall plan assets.

Paragraph (a)(18) requires applicants to provide information on which parties will bear the cost of the exemption application and notifying interested persons. The proposal revises and expands the paragraph to require that the applicant disclose the person(s) or entity who will bear the costs of: (1) the exemption application; (2) any commissions, fees, or costs associated with the exemption transaction, and any related transaction; and (3) notifying interested persons; provided, in each case, that the plan may not bear the costs of the exemption application, commissions, fees, and costs incurred to notify interested persons unless the Department determines, at its sole discretion, that a compelling circumstance exists that necessitates the payment of these expenses by the plan. The expanded language clarifies that the disclosure is intended to capture all of the costs and fees associated with the exemption transaction, not just those immediately derived from the submission of the exemption application. In this way, the Department can better understand the true cost of a particular exemption transaction. Further, the new language emphasizes the Department's view that the costs of the application, exemption transaction, and notice should not be borne by the plan and its participants and beneficiaries. Unless truly compelling circumstance exist, exemption transaction expenses should be the responsibility of parties other than the plan.

Finally, the proposal adds a new paragraph (a)(20). The new paragraph requires the applicant to state in its application whether any prior transactions have occurred between (1) the plan or plan sponsor and (2) a party involved in the exemption transaction. Requiring this information would allow the Department to determine where

the exemption transaction fits in the relationship between the plan and the parties involved in the exemption transaction and to evaluate whether the exemption transaction is part of a larger set of transactions or a pattern of practice.

The proposal makes a minor change to paragraph (b)(4). Currently, the paragraph requires the application to contain a disclosure of a net worth statement with respect to any party in interest providing a personal guarantee with respect to the exemption transaction. The proposal expands this language to cover not just parties in interest, but any party providing such a guarantee. The expansion of the language would allow the Department to more accurately determine the value of any guarantee associated with the exemption transaction.

In accordance with its discussion of § 2570.30 above as it pertains to retroactive exemption requests, the Department would also make specific revisions to the requirements for retroactive exemptions in paragraph (d). The Department proposes to amend current paragraph (d)(1) to state that the Department will consider exemption requests for retroactive relief only when (1) the safeguards necessary for the grant of a prospective exemption were in place at the time at which the parties entered into the transaction, and (2) the plan and its participants and beneficiaries have not been harmed by the transaction. An applicant for a retroactive exemption must demonstrate that the responsible plan fiduciaries acted in good faith by taking all appropriate steps necessary to protect the plan from abuse, loss, and risk at the time of the transaction. An applicant should further explain and describe whether the transaction could have been performed without engaging in a prohibited transaction. The proposal revises prior language to emphasize the applicant must demonstrate that the plan and its participants and beneficiaries were not harmed by the exemption transaction. The Department cannot readily make the findings required by Section 408(a) of ERISA that the transaction is in the interests of the plan and its participants and beneficiaries, and protective of their

rights, if, in fact, the transaction was harmful to plan participants and beneficiaries.

Further, the applicant must demonstrate that the plan fiduciaries took all appropriate steps necessary to prevent abuse, loss, and risk when the transaction took place. Including such information in the exemption application demonstrates to the Department that the fiduciaries were acting prudently to protect the plan and its participants and beneficiaries when the transaction took place. Consistent with this requirement, the proposed amendment includes language requiring the applicant to show that it evaluated other possibilities to the exemption transaction and made a determination that the exemption transaction was the appropriate option in light of the other possible solutions that were available, if any.

In order to assist applicants in demonstrating that they acted in good faith when entering into a previously consummated exemption transaction, proposed paragraph (d)(2) provides factors the Department will take into account when reviewing a retroactive exemption application. Paragraph (d)(2)(i) is revised to state that one of the factors the Department will consider is the involvement of an independent fiduciary before a transaction occurs who acts on behalf of the plan and is qualified to negotiate, approve, and monitor the transaction; provided, however, the Department may consider, at its sole discretion, an independent fiduciary's appointment and retrospective review after completion of the exemption transaction due to exigent circumstances. The proposal revises the prior language in order to provide that, in certain exigent circumstances, the Department may consider, at its sole discretion, the approval of an independent fiduciary after the fact. The Department recognizes that under certain rare and extreme circumstance an independent fiduciary's approval of the transaction after the fact may serve to assist the Department in determining whether an applicant acted in good faith.

The proposal also revises paragraph (d)(2)(v) to assist with the good faith determination. Under the amendment, the applicant would be required to submit evidence that the plan fiduciary did not engage in an act or transaction that the fiduciary should have known was prohibited under ERISA section 406 and/or Code section 4975 consistent with its ERISA fiduciary duties and responsibilities. The revised language applies the more appropriate ERISA standard that a fiduciary is responsible not only for what it knows, but what it should have known. Setting forth this standard ensures that the plan fiduciary actively engaged and evaluated the exemption transaction.

Finally, the proposal revises the last paragraph on retroactive exemptions. Paragraph (d)(3) addresses the Department's position that it will not consider retroactive exemption requests if the exemption transaction resulted in a loss for the plan. The proposal modifies the existing language to make absolutely clear that the Department's starting presumption is that it will simply not consider such requests. However, the Department also clarifies that the determination as to loss is only applied at the time of the exemption application. Thus, if the facts later show that the exemption transaction did result in a loss months or years after the completion of the exemption application, that information is not relevant to the exemption determination, which is made based on the facts available at the time.

#### *Section 2570.36*

Section 2570.36 addresses where to file an exemption application. The proposal modernizes the submission process by no longer requiring a paper submission, and instead directs applicants to [e-oed@dol.gov](mailto:e-oed@dol.gov) for submission. Applicants would retain the right to submit a paper application, and the proposal provides current information on the correct delivery addresses while noting that the address published in the Exemption Procedure Regulation may change over time. The Department will always provide the current submission address on its website.

#### *Section 2570.37*

Section 2570.37 addresses an applicant's duty to supplement the exemption application. The proposal revises paragraph (a) to state that applicants have a duty to promptly notify the Department of any material changes to facts or representations either during the Department's consideration of the application or following the Department's grant of an exemption. This duty only extends to the information that was provided at the time of the grant of the exemption. The proposal also expands the duty to disclose to the Department whether a party participating in the exemption transaction is the subject of an investigation or enforcement act in paragraph (b) by proposing to include investigative and enforcement actions by any Federal or state governmental entity, not just the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, and the Federal Retirement Thrift Investment Board.

#### *Section 2570.38*

Section 2570.38 addresses the issuance of tentative denial letters before the Department issues a final denial letter. Tentative denial letters, often referred to as TD letters, inform the applicant of issues that it needs to resolve with the Department before the Department is able to grant an exemption. The proposal revises the text to clarify that the Department may extend the twenty-day period during which an applicant normally would be required to request a hearing or notify the Department of its intent to submit additional information following the issuance of a tentative denial letter at its sole discretion. The Department is proposing this change to inform applicants that the 20-day period provides a hard deadline for the applicant to reply unless the Department chooses to extend the period at its sole discretion based on the facts and circumstances.

#### *Section 2570.39*

Section 2570.39 addresses the applicant's ability to submit additional information. Consistent with other revisions to the Exemption Procedure Regulation, the proposal

revises the text to update the manner by which the applicant may communicate with the Department. Beyond those updates, the proposal revises paragraph (b), and then makes conforming changes throughout the section, to provide that while the applicant is required to submit the additional information within forty days of the date the tentative denial letter was issued by the Department, the Department may, at its sole discretion extend the time period. As with § 2570.38, this change is made to inform the applicant that the time period is a hard deadline, unless the Department chooses to extend the period pursuant to its own discretion based on the facts and circumstances.

The proposal also deletes paragraph (d). The paragraph provided that if an applicant could not submit all of the supplementary information within the forty-day time period (unless extended by the Department), it could withdraw the application and reinstate it at a later time. The proposal deletes this provision to be consistent with proposed changes to § 2570.44, which covers withdrawn applications. As described below, the Department proposes to amend its approach regarding withdrawals and reapplications in that section.

#### *Section 2570.40*

Section 2570.40 addresses conferences between the applicant, or its representative, and the Department. The Department requests comments related to the revisions, particularly whether additional information or clarity might be useful.

Paragraph (b) provides that, generally, an applicant is entitled to only one conference under the Exemption Procedure Regulation. The proposal retains this text, but adds additional language providing that the Department may request the applicant to participate in additional conferences at its sole discretion. The Department would make such a request if it determines the conferences are appropriate based on the facts and circumstances of the exemption application.

The Department also proposes to revise paragraphs (d) through (h), which govern the timing of conferences and the submission of information. As with changes to §§ 2570.39 and 2570.40(b), the proposed amendment revises the sections to provide that the Department may, at its sole discretion extend time periods. These changes are made to similarly inform the applicant that the time periods outlined in the section provide a hard deadline for the applicant, unless the Department, based on the facts and circumstances, chooses to extend the period pursuant to its own discretion.

The proposal also adds a new paragraph (i) providing that the Department, at its sole discretion, may hold a conference with any party, including the qualified independent fiduciary or the qualified independent appraiser, regarding any matter related to an exemption request without the presence of the applicant or other parties to the exemption transaction or their representatives. Any such conferences may occur in addition to the conference with the applicant described in § 2570.40(b). The proposal adds this language to clarify that the Department is not limited with respect to whom it holds conferences. The Department proposes to reserve this right, because it may determine that under certain circumstances the Department may need to meet with a third party in order accurately assess the exemption application. For example, the Department may determine that a discussion with a qualified independent fiduciary without the presence of the applicant or its representative, may provide additional insight into the qualified independent fiduciary's work if the applicant is not present to influence the explanation of the fiduciary's work product or limit the topics which are discussed.

#### *Section 2570.41*

Section 2570.41 addresses final denial letters, which are the final action taken by the Department with respect to an application if the Department has determined that an exemption will not be granted for an exemption transaction. The proposal adds a new paragraph (a), which provides that the Department will issue a final denial letter without



issuing a tentative denial letter under § 2570.38 or conducting a hearing on the exemption under either § 2570.46 or § 2570.47, if the Department determines, at its sole discretion, that: (1) the applicant has failed to submit information requested by the Department in a timely manner; (2) the information provided by the applicant does not meet the requirements of §§ 2570.34 and 2570.35; or (3) if a conference has been held between the Department and the applicant before the issuance of a tentative denial letter during which the Department and the applicant addressed the reasons for denial that otherwise would have been set forth in a tentative denial letter pursuant to § 2570.38. While the language of §§ 2570.38, 2570.46, and 2570.47 does not require a tentative denial letter to be sent or a hearing occur under all circumstances, the current language does not clearly state that the Department may issue a final denial letter without taking those steps. To clear up this uncertainty, the proposal adds the new text to make clear that the Department, based on the reasons outlined herein, may issue final denial letters without tentative denial letters or hearings. The Department requests comments on the proposed revisions, including whether there are any circumstances in which plan participants and beneficiaries may be adversely impacted by the issuance of a final denial letter where the Department has not first issued a tentative denial letter.

The proposal also adds a new paragraph (e) which states the Department will issue a final denial letter where the applicant either (1) asks to withdraw the exemption application or (2) communicates to the Department that it is not interested in continuing the application process. This revision is consistent with the changes being made in § 2570.44. The proposal adds this text in order to provide that if the applicant decides it no longer is interested in an exemption, whether communicated through either a withdrawal or a statement of disinterest, the Department will formally memorializes the ultimate disposition of the application by issuing a final denial letter. The proposed amendment will help the Department more clearly track and manage exemption applications.

#### *Section 2570.42*

When the Department comes to the initial decision that the issuance of an exemption is warranted, § 2570.42 provides that the Department must provide for notice and comment through the publication of a proposed exemption in the *Federal Register*. The proposal revises a portion of paragraph (d). Previously, the paragraph provided that when the proposed exemption includes relief from ERISA section 406(b), Code section 4975(c)(1)(E), or FERSA section 8477(c)(2), the proposal must inform interested persons who would be adversely affected by the transaction of their right to request a hearing under § 2570.46. The proposal deletes the reference to interested persons who would be adversely affected by the exemption transaction, thus, making the text applicable to all interested persons. This revision was made to both reflect the difficulty in determining which parties are adversely affected and to ensure all parties that might have relevant information to the Department's final determination are provided with an opportunity to communicate that information.

#### *Section 2570.43*

Upon publication of a proposed exemption in the *Federal Register*, § 2570.43 provides that the applicant must provide notice to interested persons of the pendency of the exemption. The section outlines the process by which the notice is drafted and provided. The proposal revises paragraph (a) to delete "adversely" and replace it with "materially" when applying the term to the interested parties' right to a hearing to remain consistent with the proposal's revision to § 2570.42 discussed above. The proposal also makes minor changes regarding how a commenter may submit their comment and adds language to existing text advising commenters not to disclose personal data that also advises commenters not to submit confidential or otherwise protected information.

#### *Section 2570.44*

Section 2570.44 addresses the withdrawal of an exemption application. The existing provision allows an applicant to withdraw their application without the Department's issuance of a formal final denial letter. The proposal revises paragraph (b) to provide explicitly that that Department will terminate all proceedings regarding the application upon receiving an applicant's withdrawal request and issue a final denial letter. The issuance of the final denial letter will formally close the application and allow the Department to better manage its inventory of exemption applications.

The proposal revises paragraph (d) to provide that if an applicant chooses to reapply after withdrawing its application, the applicant must update all previously furnished information with respect to the prior application and the exemption transaction. Applicants currently can reapply without providing additional information after withdrawing their applications, unless the request occurs more than two years after withdrawal; however, the Department believes that applicants should be required to completely update all information when they reapply for an exemption. Therefore, the proposal treats the withdrawal as a formal denial, which shifts the burden to the applicant to present an updated application to the Department for its review.

Finally, the proposal adds a new paragraph (f) stating that following the withdrawal of an exemption application, the administrative record will remain subject to public inspection pursuant to § 2570.51. The Department is proposing this revision to clearly set forth the Department's policy that the administrative record for an exemption will always be available for public inspection after it is created.

#### *Section 2570.45*

Section 2570.45 addresses formal requests for reconsideration following a denial. The proposal adds a new paragraph (g), which provides that a request for reinstatement of an exemption application following a withdrawal pursuant to § 2570.44(d) is not a

request for reconsideration governed by § 2570.45. The Department is adding this text to draw a clear distinction between §§ 2570.44 and 2570.45.

#### *Section 2570.46*

Current § 2570.46 covers the right to a hearing with respect to a proposed exemption that provides relief from ERISA section 406(b), Code section 4975(c)(1)(E) or (F), or FERSA section 8477(c)(2) for any interested person who may be adversely affected by the exemption. The Department is proposing to expand the right to a hearing to any person who may be materially affected by an exemption that provides the relief described in this section. The determination of whether a person is materially affected would be at the sole discretion of the Department. The proposal deletes the reference to interested persons to allow any party materially affected by the exemption to provide material information. The Department requests comments on this provision, including information about the benefits or drawbacks of holding a hearing before deciding whether to grant a proposed exemption.

Similarly, the Department is changing the word “adversely” to “materially” in order to capture all relevant information with respect to the exemption transaction. Combined, these revisions assist the Department in its review of the exemption transaction by ensuring that potentially helpful information is not excluded.

The proposal also makes a minor revision to paragraph (b). The Department is inserting language to explicitly state that the Department will hold a hearing when it is necessary to explore material factual information with respect to the proposed exemption. Factual information is limited to the proposed exemption in order to ensure that the hearing is relevant to the Department’s exemption determination.

#### *Section 2570.47*

The proposal does not make any revisions to § 2570.47.

#### *Section 2570.48*

Section 2570.48 restates the Department's ERISA section 408 statutory finding requirements. The proposal's only material change was to clarify that the Department must make a finding that the exemption is administratively feasible "for the Department." The language was revised to add "for the Department" in order to clarify that the finding concerns whether the Department can feasibly administer the exemption, not the applicant.

*Section 2570.49*

Section 2570.49 addresses the various effects of and limits on the grant of an exemption. The proposal revises paragraph (e) to clarify that the determination as to whether a particular statement contained in (or omitted from) an exemption application constitutes a material fact or representation based on the totality of the facts and circumstances is made by the Department in its sole discretion. The addition of the "sole discretion" language reinforces the language of the existing paragraph and clarifies that the Department retains sole discretion with respect to the determination.

*Section 2570.50*

Section 2570.50 addresses the revocation and modification of existing exemptions. The Department requests comments on the revisions, including information about what steps might be taken to mitigate any harm to plan participants and beneficiaries in the event an exemption is revoked or modified.

The proposal substantially revises paragraph (a) to provide that, if material changes in facts, circumstances, or representations occur after an exemption takes effect, including whether a qualified independent fiduciary resigns, is terminated, or is convicted of a crime, the Department, at its sole discretion, may take steps to revoke or modify the exemption. In the event that the qualified independent fiduciary resigns, is terminated, or is convicted of a crime, the proposal requires the applicant to notify the Department within thirty 30 days of the resignation, termination, or conviction, and the Department

reserves the right to request the applicant to provide the Department with any of the information required pursuant to § 2570.34(e) and (f) at a time determined by the Department at its sole discretion.

The proposal revises paragraph (a) to ensure that granted exemptions remain protective of plans and their participants and beneficiaries. The Department reserves the right at its sole discretion to determine if material changes impact the grounds upon which the exemption was issued, thereby necessitating a change. The paragraph provides a tool by which the Department can evaluate ongoing exemptions and ensure the exemptions continue to meet the ERISA statutory requirements.

The proposal's revision of paragraph (a) also expands beyond the core material facts to address the qualified independent fiduciary. In many exemptions that employ qualified independent fiduciaries, the fiduciaries represent one of the exemption's core protective conditions. It is imperative that an applicant inform the Department if the independent fiduciary ceases to serve in that role because it resigns, is terminated, or is convicted of a crime. The proposed language would ensure that the Department will be informed of the changed circumstances and require the applicant to take necessary actions to ensure the exemption continues to be protective of the plan and its participants and beneficiaries.

In connection with the qualified independent fiduciary issue, the proposal reserves the Department's right to request that the applicant provide any of the information required pursuant to § 2570.34(e) and (f) at a time determined by the Department at its sole discretion. The Department's ability to take action with respect to the fiduciary is bolstered by this ability. The proposal's provision for access to information assists the Department's ultimate disposition of the issue and serves to ensure the exemption remains protective.

Lastly, the proposal would revise paragraph (c), which currently permits the Department to revoke or modify an exemption under certain circumstances and to give the modifications retroactive effect. The proposal would delete the reservation of the Department's right to make retroactive changes, and instead provide that changes would be prospective only. The amendment reflects the Department's concern that the ability to make retroactive changes undermines the legitimate reliance interests of applicants, plans, participants and beneficiaries in exemptions that have been granted pursuant to specific conditions.

#### *Section 2750.51*

Section 2570.51 addresses public inspection and the provision of copies of the administrative record. The proposal revises the current language in coordination with § 2570.32(d), which addresses the administrative record and the information included in the administrative record. The proposal clarifies that from the date the administrative record is established, as determined by § 2570.32(d), the administrative record is open to the public and available to copy. In addition, the proposal updates paragraph (b) to allow copies of the administrative record to be furnished electronically at the staff's discretion.

#### ***Effective Date***

The Department proposes to make this regulation effective 90 days after the date of publication of the final rulemaking in the *Federal Register*.

#### ***Regulatory Impact Analysis***

#### ***Executive Order 12866***

Under Executive Order 12866 (58 FR 51735), the Department must determine whether a regulatory action is “significant” and therefore subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive order defines a “significant regulatory action” as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially

affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as “economically significant”); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive order.

Pursuant to the terms of Executive Order 12866, it has been determined that this action is not “significant” within the meaning of section 3(f) of the Executive order and therefore is not subject to review by OMB.

### ***Paperwork Reduction Act***

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that the public understands the Department’s collection instructions, respondents can provide the requested data in the desired format, the reporting burden (time and financial resources) is minimized, and the Department can properly assess the impact of collection requirements on respondents.

Currently, the Department is soliciting comments concerning the information collection request (ICR) included in the proposed amendment of the Exemption Procedure Regulation. A copy of the ICR may be obtained by contacting the person listed in the PRA Addressee section below. The Department has submitted a copy of the



proposed rule to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department is particularly interested in comments that:

(A) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(B) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(C) Enhance the quality, utility, and clarity of the information to be collected; and

(D) Help minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., by permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; and marked "Attention: Desk Officer for the Employee Benefits Security Administration." Comments can also be submitted by Fax: 202-395-5806 (this is not a toll-free number), or by email: [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov). OMB requests that comments be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], which is 30 days from publication of the proposed amendment to ensure their consideration.

PRA Addressee: Address requests for copies of the ICR to James Butikofer, Office of Research and Analysis, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW, Room N- 5718, Washington, DC 20210 or by email at: [ebsa.opr@dol.gov](mailto:ebsa.opr@dol.gov). These are not toll-free numbers. A copy of the ICR also may be obtained at <https://www.RegInfo.gov>.

*Background*

Both ERISA and the Code contain various statutory exemptions from the prohibited transaction rules. In addition, ERISA section 408(a) authorizes the Secretary to grant administrative exemptions from the restrictions of ERISA sections 406 and 407(a), while Code section 4975(c)(2) authorizes the Secretary of the Treasury or his delegate to grant exemptions from the prohibitions of Code section 4975(c)(1). ERISA section 408(a) and Code section 4975(c)(2) also direct the Secretary and the Secretary of the Treasury, respectively, to establish procedures to carry out the purposes of these sections.

Under ERISA section 3003(b), the Secretary and the Secretary of the Treasury are directed to consult and coordinate with each other with respect to the establishment of rules applicable to the granting of exemptions from the prohibited transaction restrictions of ERISA and the Code. Under ERISA section 3004, moreover, the Secretary and the Secretary of the Treasury are authorized to develop jointly rules appropriate for the efficient administration of ERISA.

Under section 102 of Reorganization Plan No. 4 of 1978, the foregoing authority of the Secretary of the Treasury to issue exemptions under Code section 4975 was transferred, with certain enumerated exceptions not discussed herein, to the Secretary. Accordingly, the Secretary now possesses the authority under Code section 4975(c)(2), as well as under ERISA section 408(a), to issue individual and class exemptions from the prohibited transaction rules of ERISA and the Code.

On April 28, 1975, the Department published ERISA Procedure 75–1 in the *Federal Register* (40 FR 18471). This procedure provided necessary information to the affected public regarding the procedure to follow when requesting an exemption. On August 10, 1990, the Department issued its current exemption procedure regulation, which replaced ERISA Procedure 75–1, for applications for prohibited transaction exemptions filed on or after September 10, 1990. (29 CFR 2570.30 through 2570.52, 55

FR 32836, Aug. 10, 1990) Most recently, the Department published an updated Exemption Procedure Regulation in 2011 (29 CFR 2570.30 through 2570.52 (2011)). The updated Exemption Procedure Regulation revised the prohibited transaction exemption procedure to reflect changes in the Department's exemption practices since the previous exemption procedure was issued in 1990.

Under the current Exemption Procedure Regulation, the Department requires information to be provided in a written application pursuant to the requirements set forth in the Exemption Procedure Regulation. The written application is an ICR for purposes of the PRA. Sections 2570.34 and 2570.35 of the current Exemption Procedure Regulation describe the information that must be supplied by the applicant, such as, but not limited to: identifying information (name, type of plan, EIN number, etc.); an estimate of the number of plan participants; a detailed description of the exemption transaction and the parties for which an exemption is requested; a statement regarding which section of ERISA is thought to be violated and whether transaction(s) involved have already been entered into; a statement of whether the transaction is customary in the industry; a statement of the hardship or economic loss, if any, which would result if the exemption were denied; and a statement explaining why the proposed exemption would be administratively feasible, in the interests of the plan and protective of the rights of plan participants and beneficiaries. In addition, the applicant must certify that the information supplied is accurate and complete.

The proposed amendment to the Exemption Procedure Regulation would expand the ICR contained in §§ 2570.34 and 2570.35 in several respects. First, the proposal seeks to expand the information sought about the proposed exemption transaction, such as requiring a more detailed description of the exemption transaction, including the benefits derived by the parties and the costs and benefits to the plan; alternative transactions considered; and descriptions of all conflicts of interest and self-dealing. Second, the

proposal requires the inclusion of additional information in exemption applications such as a statement regarding whether the exemption transaction is in the best interest of the plan and its participant and beneficiaries and expanded disclosures with respect to any Advisory Opinions that the applicant requests with respect to any issue relating to the exemption transaction and investigations by any Federal, state, or regulatory body.

The proposal also would revise the ICR to expand the number of specialized parties from whom statements and documents must be included in exemption applications. The specialized parties covered by the existing requirements would be expanded to include not just independent appraisers and fiduciaries, but also auditors and accountants acting on the behalf of the plan, and the documents required to be disclosed with respect to those parties would expand to cover any documents submitted by those parties in support of the application. Specialized parties would be required to disclose, among other things, additional information regarding their contracts, including, but not limited to, information on indemnification provisions, waivers, and relationships with other parties involved in the exemption transaction. In addition, the qualified independent fiduciary would be required to provide more information, such as, but not limited to: information regarding conflicts of interest and fiduciary liability insurance and whether the fiduciary has been under investigation or convicted of certain crimes.

In addition to the requirements created by the application described in §§ 2570.34 and 2570.35, additional requirements are added by amending § 2570.34(d) with respect to a pre-submission applicant. Specifically, if an applicant desires to engage in a pre-submission conference or correspondence, the applicant or its representative must (1) identify and fully describe the exemption transaction; (2) identify the applicant, the applicable plan(s), and the relevant parties to the exemption transaction; and (3) set forth the prohibited transactions that the applicant believes are applicable.

Finally, the Department proposes to amend § 2570.36 to provide that the application and supporting documents may be submitted electronically. The Department expects that no longer requiring paper copies should reduce the burden associated with this ICR.

In order to assess the hour and cost burden of the revision to the current ICR associated with the Exemption Procedure Regulation, the Department updated its estimate of the number of exemption requests it expects to receive and the hour and cost burden associated with providing information required to be submitted by applicants, including the new information required under this proposal. The Department also adjusted its estimate of the labor rates for professional and clerical help and the size of plans filing exemption requests with the Department. In the revised estimate, the costs of hiring outside service providers (such as, law firms specializing in ERISA, outside appraisers, and financial experts) are accounted for as a cost burden. Requirements related to these services are more explicitly specified in the proposed rule than they were in the previous procedure, and any paperwork costs associated with these requirements are built into the estimated fees for outside services.

#### *Annual Hour Burden*

Between 2019 and 2021, the Department received an average of 22 requests annually for prohibited transaction exemptions. For purposes of this analysis, the Department assumes that the Department will receive approximately the same number of applications annually over the next three years. The paperwork burden consists of the time outside attorneys will spend to prepare and submit an exemption application, and the time required to prepare and distribute the notice of a proposed exemption to interested parties. Because notices are only distributed once a proposed application for an exemption has been published in the *Federal Register*, the Department estimates that four

applications annually will proceed to the notice stage based on the number of notices published between 2019 and 2021.

An exemption application may be made either directly by plans or by parties-in-interest to plans. The preparation of an application, however, is generally conducted by, or under the direction of, attorneys with specialized knowledge of employee benefit plans. The Department assumes that these same attorneys will also prepare and distribute the notice of the application to interested parties.

The Department estimates that, on average, 12 hours of in-house legal professional and 13 hours of in-house clerical time will be spent preparing the documentation for the application that will be used by the outside counsel. The Department estimates that total labor costs (wages plus benefits plus overhead) for legal staff would average \$140.96 per hour and \$55.23 per hour for clerical staff.<sup>5</sup> Therefore, the Department estimates that preparing the documentation for the application would require 264 in-house legal professional hours (22 applications times 12 hours) and 286 clerical hours (22 applications times 13 hours) resulting in 550 total hours at an equivalent cost of approximately \$53,009.<sup>6,7</sup>

An exemption application may be made either directly by plans or by parties-in-interest to plans. The preparation of an exemption application, however, generally is conducted by or under the direction of attorneys with specialized knowledge of ERISA. The Department assumes that these same attorneys will also prepare and distribute the notice of the application to interested parties. As discussed above, the Department

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<sup>5</sup>The Department estimates of labor costs by occupation reflect estimates of total compensation and overhead costs. Estimates for total compensation are based on mean hourly wages by occupation from the 2020 Occupational Employment Statistics and estimates of wages and salaries as a percentage of total compensation by occupation from the 2020 National Compensation Survey's Employee Cost for Employee Compensation. Estimates for overhead costs for services are imputed from the 2017 Service Annual Survey. To estimate overhead cost on an occupational basis, the Office of Research and Analysis allocates total industry overhead cost to unique occupations using a matrix of detailed occupational employment for each NAICS industry. All values are presented in 2020 dollars.

<sup>6</sup>The 286 in-house clerical hours are estimated to cost \$15,796 and the 264 in-house legal professional hours are estimated to cost \$37,213. This totals to \$53,009.

<sup>7</sup>Any discrepancies in the calculations are a result of rounding.

proposes to revise the requirements for specialized statements and documents. The specialized parties would be required to disclose, among other things, additional information regarding their contracts, including, but not limited to, information on indemnification provisions, waivers, and relationships with other parties involved in the exemption transaction.

Because of the large amount of paperwork that is submitted (applications average approximately 100 pages with varying numbers of supporting documents), and complexity of the issues, the Department estimates that, on average, 52 hours of outside legal professional work will be spent preparing the documentation for the application. The Department requests comment on the accuracy of this assumption and notes that there could be a large dispersion in the number of hours required, based on the complexity of the application. Total labor costs (wages plus benefits plus overhead) for outside legal staff was estimated to average \$494.00 per hour.<sup>8</sup> Therefore, the Department estimates that preparing the applications will require 1,144 in-house legal professional hours (22 applications times 52 hours) with an equivalent cost of \$565,136. This estimate includes potential meetings with Department personnel as well as preparation of supplementary documents that are requested following some of these meetings. For some of the more complex cases, the Department will request a Summary of Proposed Exemption (SPE), which will involve a one page summary of the rationale for the transaction.

As discussed above, the Department proposes to make substantial revisions to the requirements set forth in paragraphs (c) through (f) regarding statements and documents about qualified independent appraisers and qualified independent fiduciaries that are involved in an exemption transaction. The changes relate to the revisions made to the

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<sup>8</sup> The outside legal staff labor rate is a composite weighted average of the Laffey Matrix for Wage Rates.  $((\$381 \times 0.4) + (\$468 \times 0.35) + (\$676 \times 0.15) + (\$764 \times 0.1) = \$494)$ .  
<http://www.laffeymatrix.com/sec.html>

definitions of qualified independent appraiser and qualified independent fiduciary in § 2570.31. The Department assumes that an outside qualified independent fiduciary and an outside appraiser/expert will help prepare documentation for the application. Total labor costs for outside fiduciary and outside appraiser were estimated to average \$291.23 per hour.<sup>9</sup> Therefore, the Department estimates that preparing the applications will require 748 hours of work by outside fiduciaries (22 applications times 34 hours) and 308 hours of work by outside appraisers/experts (22 times 14 hours) totaling approximately \$307,539. The new requirements contained in the proposal are incorporated into these estimates.<sup>10</sup>

For applications that reach the stage of publication in the *Federal Register* as pending approval, a notice must be prepared and distributed to interested parties. The Department estimates that four applications will be published annually and that approximately 3,480 notices to interested parties will be distributed. The distribution of the notices is estimated to require about 5 minutes of in-house clerical time per interested party. Therefore, distribution of notices will require approximately 290 hours at an equivalent cost of approximately \$16,017 (5 minutes/60 minutes) times 3,480 notices times \$55.23 hourly clerical rate).

Proposed amendments to § 2730.31(k) define a pre-submission applicant and § 2570.34(d) imposes requirements on the pre-submission applicant. If an applicant desires to engage in a pre-submission conference or correspondence, the applicant or its representative must (1) identify and fully describe the exemption transaction; (2) identify the applicant, the applicable plan(s), and the relevant parties to the exemption transaction;

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<sup>9</sup> The wage rate for the outside fiduciary and outside appraiser, which was estimated as \$250 in 2014, was adjusted for inflation. The CPI in October 2014 was 237.433 ([https://www.bls.gov/news.release/archives/cpi\\_11202014.pdf](https://www.bls.gov/news.release/archives/cpi_11202014.pdf)) and the CPI in October 2021 was 276.589 (<https://www.bls.gov/news.release/pdf/cpi.pdf>). Thus, the percent change in the CPI from October 2014 to October 2021 is estimated to be approximately 1.165 and therefore, the adjusted wage rate is \$291 (\$250 x 1.165).

<sup>10</sup> The 308 outside appraiser/expert hours are estimated to cost \$89,699 and the 748 outside fiduciary hours are estimated to cost \$217,840. This totals to \$307,539.



and (3) set forth the prohibited transactions that the applicant believes are applicable.

While the number of entities that would satisfy the definition of pre-submission applicant is not tracked, most applicants do contact the Department. Other entities that satisfy the definition of a pre-submission applicant, but that do not end up submitting an application also contact the Department. To account for these additional entities, an estimate of 25 pre-submission applicants is used. The required information is required on the application, so for those submitting an application, the requirement does not create a new burden, but rather only changes the timing of providing the information. For those five entities that do not submit an application, an hour of an in-house legal professional's time could be required. This creates an additional five hours of burden with an equivalent cost of \$705.<sup>11</sup>

The overall hour burden for this ICR is approximately 3,045 hours at an equivalent cost of approximately \$942,406.

#### *Annual Cost Burden*

The Department estimates that 3,480 notices to interested persons will be sent, and that 2,784 of the notices (80 percent) will be distributed via first class mail with a material cost of \$0.05 per page and distribution costs of \$0.58 per notice. This generates an estimated cost of approximately \$1,754. The Department further estimates that approximately 522 (15 percent of the total number of notices) will be distributed electronically and 174 (5 percent) will be distributed by alternative means approved by the Department, for example in highly visible area within a factory, at no cost. The Department notes that it determines whether it is appropriate to distribute notices by means other than mailing on a case-by-case basis and only will allow a method to be used that ensures actual receipt based on the demographics of the class of interested persons.

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<sup>11</sup>  $(5 * \$140.96) = \$705$ .

The Departments estimates that SPEs will be requested with respect to approximately three submissions (15 percent of the 22 submissions) per year, and that the SPEs will be sent with the notices. Based on an average plan size of 696 participants per plan, this results in the distribution of approximately 2,297 SPEs, of which approximately 1,837 (80 percent) will be mailed. The material cost associated with mailing the 1,837 SPEs at \$.05 per page is approximately \$92. Therefore, the total cost burden for distribution of the notices and SPEs is estimated to be approximately \$1,846 (\$1,754 for the notices + \$92 for the cost of including the SPEs).

Overall, the cost burden associated with this ICR is approximately \$1,846.

The paperwork burden estimates are summarized as follows:

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Employee Retirement Income Security Act of 1974 Section 408(a)

Prohibited Transaction Provisions Exemption Application Procedure

*OMB Control Number:* 1210-0060.

*Affected Public:* Businesses or other for-profits.

*Type of Review:* Revision

*Estimated Number of Respondents:* 22

*Estimated Number of Annual Responses:* 5,799

*Frequency of Response:* Annual or as needed.

*Estimated Total Annual Burden Hours:* 3,045 hours

*Estimated Total Annual Burden Cost:* \$1,846

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 et seq.) and which are likely to have a significant economic impact on a substantial number

of small entities. Unless the head of an agency certifies that a proposed rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities and seeking public comment on such impact.

For purposes of the RFA, the Department continues to consider a small entity to be an employee benefit plan with fewer than 100 participants.<sup>12</sup> Further, while some large employers may have small plans, in general small employers maintain most small plans. Thus, the Department believes that assessing the impact of this proposed rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 et seq.). The Department therefore requests comments on the appropriateness of the size standard used in evaluating the impact of this proposed rule on small entities.

By this standard, the Department estimates that nearly half the requests for exemptions would be from small plans. Thus, of the approximately 639,751 ERISA-covered small plans, the Department estimates that 20 small plans (.0031% of small plans) file prohibited transaction exemption applications each year. The Department does not consider this to be a substantial number of small entities. Therefore, based on the foregoing, pursuant to section 605(b) of RFA, the Assistant Secretary of the Employee Benefits Security Administration hereby certifies that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. The

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<sup>12</sup> The basis for this definition is found in ERISA section 104(a)(2), which permits the Secretary to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Pursuant to the authority of ERISA section 104(a)(3), the Department has previously issued at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46 and 2520.104b–10 certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans covering fewer than 100 participants and satisfying certain other requirements.

Department invites comments on this certification and the potential impact of the rule on small entities.

#### *Congressional Review Act*

The proposed rule being issued here will, when finalized, be subject to the provisions of the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.) and will be transmitted to Congress and the Comptroller General for review.

#### *Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), the proposed rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or impose an annual burden exceeding \$100 million or more, adjusted for inflation, on the private sector.

#### *Federalism Statement*

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires Federal agencies to adhere to specific criteria in the process of their formulation and implementation of policies that have substantial direct effects on the States, or the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. This proposed rule does not have federalism implications, because it has no substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. ERISA section 514 provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in the rule do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications

for the States or the relationship or distribution of power between the National Government and the States.

### **List of Subjects in 29 CFR Part 2570**

Administrative practice and procedure, Employee benefit plans, Employee Retirement Income Security Act, Federal Employees' Retirement System Act, Exemptions, Fiduciaries, Party in interest, Pensions, Prohibited transactions, Trusts and trustees.

For the reasons set forth in the preamble, the Department proposes to amend subchapter G, part 2570 of chapter XXV of title 29 of the Code of Federal Regulations as follows:

### **PART 2570—PROCEDURAL REGULATIONS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT**

1. The authority citation for part 2570 continues to read as follows:

**Authority:** 5 U.S.C. 8477; 29 U.S.C. 1002(40), 1021, 1108, 1132, and 1135; sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App at 672 (2006); Secretary of Labor's Order 3–2010, 75 FR 55354 (September 10, 2010).

Subpart I is also issued under 29 U.S.C. 1132(c)(8).

2. Revise subpart B to read as follows:

#### **Subpart B - Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications**

Sec.

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**Subpart B—Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications**

**§ 2570.30 Scope of this subpart.**

(a) The rules of procedure set forth in this subpart apply to applications for prohibited transaction exemptions issued by the Department under the authority of:

(1) Section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA);

(2) Section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code); or

**Note 1 to paragraph (a)(2).** See H.R. Rep. No. 1280, 93d Cong., 2d Sess. 310 (1974), and also section 102 of Presidential Reorganization Plan No. 4 of 1978 (3 CFR, 1978 Comp., p. 332, reprinted in 5 U.S.C. app. at 672 (2006), and in 92 Stat. 3790 (1978)), effective December 31, 1978, which generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under section 4975(c)(2) of the Code to the Department.

(3) The Federal Employees' Retirement System Act of 1986 (FERSA) (5 U.S.C. 8477(c)(3)).

(b) Under the rules of procedure in this subpart, the Department may conditionally or unconditionally exempt any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by ERISA section 406 and the corresponding restrictions of the Code and FERSA. While administrative exemptions granted under the rules in this subpart are ordinarily prospective in nature, it is possible that an applicant may obtain retroactive relief for past prohibited transactions if, among other things, the Department determines that appropriate safeguards were in place at the time the transaction was consummated, and no plan participants or beneficiaries were harmed by the transaction.

(c) The rules in this subpart govern the filing and processing of applications for both individual and class exemptions that the Department may propose and grant pursuant to the authorities cited in paragraph (a) of this section. The Department may also propose and grant exemptions on its own motion, in which case the procedures relating to publication of notices, hearings, evaluation, and public inspection of the administrative record, and modification or revocation of previously granted exemptions will apply.

(d) The issuance of an administrative exemption by the Department under the procedural rules in this subpart does not relieve a fiduciary or other party in interest or

disqualified person with respect to a plan from the obligation to comply with certain other provisions of ERISA, the Code, or FERSA, including any prohibited transaction provisions to which the exemption does not apply, and the general fiduciary responsibility provisions of ERISA, if applicable, which require, among other things, that a fiduciary discharge his or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion; nor does it affect the requirement of Code section 401(a) that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries.

(e) The Department will not propose or issue exemptions upon oral request alone, nor will the Department grant exemptions orally. An applicant for an administrative exemption may request and receive oral feedback from Department employees in preparing an exemption application, which will not be binding on the Department in its processing of an exemption application or in its examination or audit of a plan. Such feedback will become part of the administrative record as set forth in § 2570.32(c).

(f) The Department will generally treat any exemption application that is filed solely under ERISA section 408(a) or solely under Code section 4975(c)(2) as an exemption request filed under both ERISA section 408(a) and Code section 4975(c)(2) if it relates to a plan that is subject to both ERISA and the Code and the transaction would be prohibited both by ERISA and the corresponding provisions of the Code.

(g) The Department's issuance of an administrative exemption is at its sole discretion based on the statutory criteria set forth in ERISA section 408(a) and Code section 4975(c)(2). The existence of previously issued administrative exemptions is not determinative of whether future exemption applications with the same or similar facts will be proposed, or whether a proposed exemption will contain the same conditions as a previously issued administrative exemption.

#### **§ 2570.31 Definitions.**



For purposes of the procedures in this subpart, the following definitions apply:

(a) An *affiliate of a person* means—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person. For purposes of this paragraph (a)(1), the term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(2) Any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)) of any such person; or

(3) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, partner, or five percent or more owner.

(b) A *class exemption* is an administrative exemption, granted under ERISA section 408(a), Code section 4975(c)(2), and/or 5 U.S.C. 8477(c)(3), which applies to any transaction and party in interest within the class of transactions and parties in interest specified in the exemption when the conditions of the exemption are satisfied.

(c) *Department* means the U.S. Department of Labor and includes the Secretary of Labor or his or her delegate exercising authority with respect to prohibited transaction exemptions to which this subpart applies.

(d) *Exemption transaction* means the transaction or transactions for which an exemption is requested.

(e) An *individual exemption* is an administrative exemption, granted under ERISA section 408(a), Code section 4975(c)(2), and/or 5 U.S.C. 8477(c)(3), which applies only to the specific parties in interest and transactions named or otherwise defined in the exemption.

(f) A *party in interest* means a person described in ERISA section 3(14) or 5 U.S.C. 8477(a)(4) and includes a disqualified person, as defined in Code section 4975(e)(2).

(g) *Pooled fund* means an account or fund for the collective investment of the assets of two or more unrelated plans, including (but not limited to) a pooled separate account maintained by an insurance company and a common or collective trust fund maintained by a bank or similar financial institution.

(h) A *qualified appraisal report* is any appraisal report that:

(1) Is prepared solely on behalf of the plan by a qualified independent appraiser; and

(2) Satisfies all of the requirements set forth in § 2570.34(c)(4).

(i) A *qualified independent appraiser* is any individual or entity with appropriate training, experience, and facilities to provide a qualified appraisal report on behalf of the plan regarding the particular asset or property appraised in the report, that is independent of and unrelated to:

(1) Any party involved in the exemption transaction (as defined in paragraph (l) of this section); and

(2) The qualified independent fiduciary, if one is present with respect to the exemption transaction; in general, the determination as to the independence of the appraiser is made by the Department on the basis of all relevant facts and circumstances. In making this determination, the Department will take into account the amount of the appraiser's revenues and projected revenues for the current Federal income tax year (including amounts received for preparing the appraisal report) that will be derived from parties involved in the exemption transaction relative to the appraiser's revenues from all sources for the appraiser's prior Federal income tax year and the appraiser's projected revenue for the current Federal income tax year as well as the appraiser's related business interests. An appraiser will not be treated as independent if the revenues it receives or is projected to receive, within the current Federal income tax year, from parties involved in the exemption transaction are more than two percent of such appraiser's annual revenues

from all sources based upon either its prior Federal income tax year or the appraiser's projected revenues for the current Federal income tax year, unless, in its sole discretion, the Department determines otherwise.

(j) A *qualified independent fiduciary* is any individual or entity with appropriate training, experience, and facilities to act on behalf of the plan regarding the exemption transaction in accordance with the fiduciary duties and responsibilities prescribed by ERISA, that is independent of and unrelated to: any party involved in the exemption transaction (as defined in paragraph (l) of this section) and any other party involved in the development of the exemption request. In general, the determination as to the independence of a fiduciary will be made by the Department on the basis of all relevant facts and circumstances. Among other things, the Department will consider whether the fiduciary has an interest in the subject transaction or future transactions of the same nature or type. In making this determination, the Department will also take into account, among other things, the amount of both the fiduciary's revenues and projected revenues for the current Federal income tax year (including amounts received for preparing fiduciary reports) that will be derived from parties involved in the exemption transaction relative to the fiduciary's revenues from all sources for the prior Federal income tax year or the fiduciary's projected revenues from all sources for the current Federal income tax year. A fiduciary will not be treated as independent if the revenues it receives or is projected to receive, within the current Federal income tax year, from parties (and their affiliates) involved in the exemption transaction are more than two percent of either the fiduciary's annual revenues from all sources based upon its prior Federal income tax year or the fiduciary's projected revenue for the current Federal income tax year, unless, in its sole discretion, the Department determines otherwise.

(k) A *pre-submission applicant* is a party that contacts the Department, either orally or in writing, to inquire whether a party with a particular fact pattern would need to

submit an exemption application and, if so, what conditions and relief would be applicable. A party that contacts the Department to inquire broadly, without reference to a specific fact pattern, about prohibited transaction exemptions is not a pre-submission applicant.

(l) *A party involved in the exemption transaction* includes:

(1) A party in interest (as defined in paragraph (f) of this section);

(2) Any party that is engaged in the exemption transaction or an affiliate of the party that is engaged in the exemption transaction; and

(3) Any party providing services to either the plan or a party described in paragraph (1)(1) or (2) of this section with respect to the exemption transaction or its affiliates.

**§ 2570.32 Persons who may apply for exemptions and the administrative record.**

(a) The persons who may apply for exemptions are as follows:

(1) Any party in interest to a plan who is or may be a party to the exemption transaction;

(2) Any plan which is a party to the exemption transaction; or

(3) In the case of an application for an exemption covering a class of parties in interest or a class of transactions, in addition to any person described in paragraphs (a)(1) and (2) of this section, an association or organization representing parties in interest who may be parties to the exemption transaction.

(b) An application by or for a person described in paragraph (a) of this section may be submitted by the applicant or by an authorized representative. An application submitted by an authorized representative of the applicant must include proof of authority in the form of:

(1) A power of attorney; or

(2) A written certification from the applicant that the representative is authorized to file the application.

(c) If the authorized representative of an applicant submits an application for an exemption to the Department together with proof of authority to file the application as required by paragraph (b) of this section, the Department will direct all correspondence and inquiries concerning the application to the representative unless requested to do otherwise by the applicant.

(d)(1) The administrative record is open for public inspection, pursuant to § 2570.51(a), from the date an applicant or pre-submission applicant provides any information or documentation to the Office of Exemption Determinations.

(2) The administrative record includes, but is not limited to: any documents submitted to, and accepted by, the Department before the initial application, whether provided in writing by the applicant or pre-submission applicant or as notes taken at a pre-submission conference; the initial exemption application and any modifications or supplements to the application; all correspondence with the applicant or pre-submission applicant, whether before or after the applicant's submission of the exemption application; and any supporting information provided by the applicant or pre-submission applicant, whether provided orally or in writing (as well as any comments and testimony received by the Department in connection with an application).

(3) If documents are required to be provided in writing, by either the applicant or the Department, the documents may be provided either by mail or electronically, unless otherwise indicated by the Department at its sole discretion.

**§ 2570.33 Applications the Department will not ordinarily consider.**

(a) The Department ordinarily will not consider:

(1) An application that fails to include all the information required by §§ 2570.34 and 2570.35 (or fails to include current information) or otherwise fails to conform to the requirements in this subpart; or

(2) An application involving a transaction or transactions which are the subject of an investigation for possible violations of ERISA, the Code, FERSA, or any other Federal or state law; or an application involving a party in interest who is the subject of such an investigation or who is a defendant in an action by the Department, the Internal Revenue Service, or any other regulatory entity to enforce ERISA, the Code, FERSA, or any other Federal or state laws.

(b) An application for an individual exemption relating to a specific transaction or transactions ordinarily will not be considered if the Department has under consideration a class exemption relating to the same type of transaction or transactions. Notwithstanding the foregoing, the Department may consider such an application if the issuance of the final class exemption may not be imminent, and the Department determines that time constraints necessitate consideration of the transaction on an individual basis.

(c) If a party, excluding a Federal, state, or other governmental entity, designates as confidential any information submitted in connection with its exemption request, the Department will not process the application unless and until the applicant withdraws its claim of confidentiality. By submitting an exemption application, an applicant consents to public disclosure, pursuant to § 2570.51, of the entire administrative record.

(d) The Department will not engage a pre-submission applicant or its representative, whether through written correspondence or a conference, if the pre-submission applicant does not:

(1) Identify and fully describe the exemption transaction;

(2) Identify the applicant, the applicable plan(s), and the relevant parties to the exemption transaction; and

(3) Set forth the prohibited transactions that the applicant believes are applicable.

**§ 2570.34 Information to be included in every exemption application.**

(a) All applications for exemptions must contain the following information:

(1) The name(s), address(es), phone number(s), and e-mail address(es) of the applicant(s);

(2) A detailed description of the exemption transaction, including the identification of all the parties involved in the exemption transaction, a description of any larger integrated transaction of which the exemption transaction is a part, and a chronology of the events leading up to the transaction;

(3) The identity, address, phone number, and e-mail address of any representatives for the affected plan(s) and parties in interest and what individuals or entities they represent;

(4) A description of:

(i) The reason(s) for engaging in the exemption transaction;

(ii) Any material benefit that may be received by a party involved in the exemption transaction as a result of the subject transaction (including the avoidance of any materially adverse outcome by a party as a result of engaging in the exemption transaction); and

(iii) The costs and benefits of the exemption transaction to the affected plan(s), participants, and beneficiaries, including quantification of those costs and benefits to the extent possible;

(5) A detailed description of the alternatives to the exemption transaction that did not involve a prohibited transaction and why those alternatives were not pursued;

(6) The prohibited transaction provisions from which exemptive relief is requested and the reason why the exemption transaction would violate each such provision;

(7) A description of each conflict of interest or potential instance of self-dealing that would be permitted if the exemption is granted;

(8) Whether the exemption transaction is or has been the subject of an investigation or enforcement action by the Department, the Internal Revenue Service, or any other regulatory authority; and

(9) The hardship or economic loss, if any, which would result to the person or persons on behalf of whom the exemption is sought, to affected plans, and to their participants and beneficiaries from denial of the exemption.

(10) With respect to the exemption transaction's definition of affiliate, if applicable, either a statement that the definition of affiliate set forth in § 2570.31(a) is applicable or a statement setting forth why a different affiliate definition should be applied.

(b) All applications for exemption must also contain the following:

(1) A statement explaining why the requested exemption would meet the requirements of ERISA section 408(a) by being—

(i) Administratively feasible for the Department;

(ii) In the interests of affected plans and their participants and beneficiaries; and

(iii) Protective of the rights of participants and beneficiaries of affected plans.

(2) A statement that the exemption transaction either:

(i)(A) Will be in the best interest of the plan and its participants and beneficiaries;

(B) That all compensation received, directly or indirectly, by a party involved in the exemption transaction does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and

(C) That all of the statements to the Department, the plan, or, if applicable, the qualified independent fiduciary or qualified independent appraiser about the exemption



transaction and other relevant matters are not, at the time the statements are made, materially misleading; or

(ii) Why the exemption standards in paragraphs (b)(2)(i)(A) through (C) of this section should not be applicable to the exemption transaction.

(iii) For purposes of this paragraph (b)(2), an exemption transaction is in the best interest of a plan if the plan fiduciary causing the plan to enter into the transaction determines, with the care, skill, prudence, and diligence under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would, in the conduct of an enterprise of a like character and with like aims, enter into the exemption transaction based on the circumstances and needs of the plan. Such fiduciary shall not place the financial or other interests of itself, a party to the exemption transaction, or any affiliate ahead of the interests of the plan, or subordinate the plan's interests to any party or affiliate.

(3) With respect to the notification of interested persons required by § 2570.43:

(i) A description of the interested persons to whom the applicant intends to provide notice;

(ii) The manner in which the applicant will provide such notice; and

(iii) An estimate of the time the applicant will need to furnish notice to all interested persons following publication of a notice of the proposed exemption in the *Federal Register*.

(4) If any party to the exemption transaction has requested either an advisory opinion from the Department or any similar opinion or guidance from another Federal, state, or regulatory body with respect to any issue relating to the exemption transaction—

(i) A copy of the opinion, letter, or similar document concluding the Department's or other entity's action on the request; or

(ii) If the Department or other entity has not yet concluded its action on the request:

(A) A copy of the request or the date on which it was submitted and, solely with respect to an advisory opinion request to the Department, the Department's correspondence control number as indicated in the acknowledgment letter; and

(B) An explanation of the effect of the issuance of an advisory opinion by the Department or similar opinion or guidance from another Federal, state, or regulatory body would have upon the exemption transaction.

(5) If the application is to be signed by anyone other than the party in interest seeking exemptive relief on his or her own behalf, a statement which—

(i) Identifies the individual signing the application and his or her position or title; and

(ii) Explains briefly the basis of his or her familiarity with the matters discussed in the application.

(6)(i) A declaration in the following form:

Under penalty of perjury, I declare that I am familiar with the matters discussed in this application and, to the best of my knowledge and belief, the representations made in this application are true and correct.

(ii) This declaration must be dated and signed by:

(A) The applicant, in its individual capacity, in the case of an individual party in interest seeking exemptive relief on his or her own behalf;

(B) A corporate officer or partner where the applicant is a corporation or partnership;

(C) A designated officer or official where the applicant is an association, organization or other unincorporated enterprise; or

(D) The plan fiduciary that has the authority, responsibility, and control with respect to the exemption transaction where the applicant is a plan.

(c) Statements and documents from a qualified independent appraiser, auditor, or accountant acting solely on behalf of the plan, such as appraisal reports, analyses of market conditions, audits, or financial documents submitted to support an application for exemption must be accompanied by a statement of consent from such appraiser, auditor, or accountant acknowledging that the statement is being submitted to the Department as part of an application for exemption. Such statements by the qualified independent appraiser, auditor, or accountant must also contain the following written information:

(1) A signed and dated declaration under penalty of perjury that, to the best of the qualified independent appraiser's, auditor's, or accountant's knowledge and belief, all of the representations made in such statement are true and correct;

(2) A copy of the qualified independent appraiser's, auditor's, or accountant's engagement letter and, if applicable, contract with the plan describing the specific duties the appraiser, auditor, or accountant shall undertake. The letter or contract may not:

(i) Include any provision that provides for the direct or indirect indemnification or reimbursement of the independent appraiser, auditor, or accountant by the plan or another party for any failure to adhere to its contractual obligations or to Federal and state laws applicable to the appraiser's, auditor's, or accountant's work; or

(ii) Waive any rights, claims or remedies of the plan or its participants and beneficiaries under ERISA, the Code, or other Federal and state laws against the independent appraiser, auditor, or accountant with respect to the exemption transaction;

(3) A summary of the qualified independent appraiser's, auditor's, or accountant's qualifications to serve in such capacity;

(4) A detailed description of any relationship that the qualified independent appraiser, auditor, or accountant has had or may have with the plan or any party involved

in the exemption transaction, or with any party or its affiliates involved in the development of the exemption request that may influence the appraiser, auditor, or accountant, including a description of any past engagements with the appraiser, auditor, or accountant;

(5) A written appraisal report prepared by the qualified independent appraiser, acting solely on behalf of the plan, rather than, for example, on behalf of the plan sponsor, must satisfy the following requirements:

(i) The report must describe the method(s) used in determining the fair market value of the subject asset(s) and an explanation of why such method best reflects the fair market value of the asset(s);

(ii) The report must take into account any special benefit that a party involved in the exemption transaction may derive from control of the asset(s), such as from owning an adjacent parcel of real property or gaining voting control over a company; and

(iii) The report must be current and not more than one year old from the date of the transaction, and there must be a written update by the qualified independent appraiser affirming the accuracy of the appraisal as of the date of the transaction;

(6) If the subject of the appraisal report is real property, the qualified independent appraiser shall submit a written representation that he or she is a member of a professional organization of appraisers that can sanction its members for misconduct;

(7) If the subject of the appraisal report is an asset other than real property, the qualified independent appraiser shall submit a written representation describing the appraiser's prior experience in valuing assets of the same type; and

(8) The qualified independent appraiser shall submit a written representation disclosing the percentage of its current revenue that is derived from any party involved in the exemption transaction with respect to both the prior Federal income tax year and

current Federal income tax year; in general, such percentage shall be computed with respect to the two separate disclosures by comparing, in fractional form:

(i) The amount of the appraiser's projected revenues from the current Federal income tax year (including amounts received from preparing the appraisal report) that will be derived from the parties involved in the exemption transaction (expressed as a numerator); and

(ii) The appraiser's revenues from all sources for the prior Federal income tax year (expressed as a denominator) or the appraiser's projected revenues from all sources for the current Federal income tax year (expressed as a denominator).

(d) For those exemption transactions requiring the retention of a qualified independent appraiser, the applicant must include:

(1) A statement describing the process by which the independent appraiser was selected, including the due diligence performed, the potential independent appraiser candidates reviewed, and the references contacted; and

(2) A statement that the independent appraiser has appropriate technical training and proficiency with respect to the specific details of the exemption transaction.

(e) For those exemption transactions requiring the retention of a qualified independent fiduciary to represent the interest of the plan, the applicant must include:

(1) A statement describing the process by which the independent fiduciary was selected, including the due diligence performed, the potential independent fiduciary candidates reviewed, and the references contacted; and

(2) A statement that the independent fiduciary has appropriate technical training and proficiency with respect to:

(i) ERISA and the Code; and

(ii) The specific details of the exemption transaction.

(f) For exemption transactions requiring the retention of a qualified independent fiduciary to represent the interests of the plan, a statement must be submitted by the independent fiduciary that contains the following written information:

(1) A signed and dated declaration under penalty of perjury that, to the best of the qualified independent fiduciary's knowledge and belief, all of the representations made in such statement are true and correct;

(2) A copy of the qualified independent fiduciary's engagement letter and, if applicable, contract with the plan describing the fiduciary's specific duties. The letter or contract may not:

(i) Contain any provisions that violates ERISA section 410;

(ii) Include any provision that provides for the direct or indirect indemnification or reimbursement of the independent fiduciary by the plan or other party for any failure to adhere to its contractual obligations or to state or Federal laws applicable to the independent fiduciary's work; or

(iii) Waive any rights, claims, or remedies of the plan under ERISA, state, or Federal law against the independent fiduciary with respect to the exemption transaction;

(3)(i) A statement that the independent fiduciary maintains fiduciary liability insurance in an amount that is sufficient to indemnify the plan for damages resulting from a breach by the independent fiduciary of either:

(A) ERISA, the Code, or any other Federal or state law; or

(B) Its contract or engagement letter.

(ii) The insurance may not contain an exclusion for actions brought by the Secretary or any other Federal, state, or regulatory body; the plan; or plan participants or beneficiaries;

(4) An explanation of the bases for the conclusion that the fiduciary is a qualified independent fiduciary, which also must include a summary of that person's qualifications

to serve in such capacity, as well as a description of any prior experience by that person or other demonstrated characteristics of the fiduciary (such as special areas of expertise) that render that person or entity suitable to perform its duties on behalf of the plan with respect to the exemption transaction;

(5) A detailed description of any relationship that the qualified independent fiduciary has had or may have with a party involved in the exemption transaction;

(6) An acknowledgement by the qualified independent fiduciary that it understands its duties and responsibilities under ERISA; is acting as a fiduciary of the plan with respect to the exemption transaction; has no material conflicts of interest with respect to the exemption transaction; and is not acting as an agent or representative of the plan sponsor;

(7) The qualified independent fiduciary's opinion on whether the exemption transaction would be in the interests of the plan and its participants and beneficiaries, protective of the rights of participants and beneficiaries of the plan, and in compliance with the standards set forth in paragraphs (b)(2)(i)(A) through (C) of this section, if applicable, along with a statement of the reasons on which the opinion is based;

(8) Where the exemption transaction is continuing in nature, a declaration by the qualified independent fiduciary that it is authorized to take all appropriate actions to safeguard the interests of the plan, and will, during the pendency of the transaction:

(i) Monitor the exemption transaction on behalf of the plan and its participants and beneficiaries on a continuing basis;

(ii) Ensure that the exemption transaction remains in the interests of the plan and its participants and beneficiaries and, if not, take any appropriate actions available under the particular circumstances; and

(iii) Enforce compliance with all conditions and obligations imposed on any party dealing with the plan with respect to the transaction;

(9) The qualified independent fiduciary shall submit a written representation disclosing the percentage of the independent fiduciary's current revenue that is derived from any party involved in the exemption transaction with respect to both the prior Federal income tax year and current Federal income tax year; in general, such percentage shall be computed with respect to the two disclosures by comparing in fractional form:

(i) The amount of the independent fiduciary's projected revenues from the current Federal income tax year that will be derived from the parties involved in the transaction (expressed as a numerator); and

(ii) The independent fiduciary's revenues from all sources (excluding fixed, non-discretionary retirement income) for the prior Federal income tax year (expressed as a denominator) and the independent fiduciary's projected revenue from all sources (excluding fixed, non-discretionary retirement income) for the current Federal income tax year (expressed as a denominator);

(10) A statement that the independent fiduciary has no conflicts of interest with respect to the exemption transaction that could affect the exercise of its best judgment as a fiduciary;

(11) Either:

(i) A statement that, within the last five years, the independent fiduciary has not been under investigation or examination by, and has not engaged in litigation, or a continuing controversy with, the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, the Federal Retirement Thrift Investment Board, or any other Federal or state entity involving compliance with provisions of ERISA, the Code, FERSA, or other Federal or state law; or

(ii) A statement describing the applicable investigation, examination, litigation or controversy; and



(12)(i) Either a statement that, within the last 13 years, the independent fiduciary has not been either convicted or released from imprisonment, whichever is later, as a result of:

(A) Any felony involving abuse or misuse of such person's position or employment with an employee benefit plan or a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime of which any of the foregoing crimes is an element; or any crime described in ERISA section 411; or

(B) Convicted by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of any crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense described in:

(1) And a description of the circumstances of any such conviction; or

(2) A statement describing a conviction or release from imprisonment described in paragraph (f)(12)(i)(A) of this section or this paragraph (f)(12)(i)(B).

(ii) For purposes of this paragraph (f), a person shall be deemed to have been “convicted” from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal; and regardless of whether the foreign jurisdiction considers a trial court judgment final while under appeal.

(g) Statements, as applicable, from other third-party experts, including but not limited to economists or market specialists, submitted on behalf of the plan to support an exemption application must be accompanied by a statement of consent from such expert acknowledging that the statement prepared on behalf of the plan is being submitted to the

Department as part of an exemption application. Such statements must also contain the following written information:

- (1) A copy of the expert's engagement letter and, if applicable, contract with the plan describing the specific duties the expert will undertake;
- (2) A summary of the expert's qualifications to serve in such capacity; and
- (3) A detailed description of any relationship that the expert has had or may have with any party involved in the exemption transaction that may influence the actions of the expert.

(h) An application for exemption may also include a draft of the requested exemption which describes the transaction and parties in interest for which exemptive relief is sought and the specific conditions under which the exemption would apply.

**§ 2570.35 Information to be included in applications for individual exemptions only.**

(a) Except as provided in paragraph (c) of this section, every application for an individual exemption must include, in addition to the information specified in § 2570.34, the following information:

- (1) The name, address, e-mail address, telephone number, and type of plan or plans to which the requested exemption applies;
- (2) The Employer Identification Number (EIN) and the plan number (PN) used by such plan or plans in all reporting and disclosure required by the Department (individuals should not submit Social Security numbers);
- (3) Whether any plan or trust affected by the requested exemption has ever been found by the Department, the Internal Revenue Service, or by a court to have violated the exclusive benefit rule of Code section 401(a), Code section 4975(c)(1), ERISA sections 406 or 407(a), or 5 U.S.C. 8477(c)(3), including a description of the circumstances surrounding such violation;

(4) Whether any relief under ERISA section 408(a), Code section 4975(c)(2), or 5 U.S.C. 8477(c)(3) has been requested by, or provided to, the applicant or any of the parties involved in the exemption transaction and, if so, the exemption application number or the prohibited transaction exemption number;

(5) Whether the applicant or any of the parties involved in the exemption transaction are currently, or have been within the last five years, defendants in any lawsuits or criminal actions concerning their conduct as a fiduciary or party in interest with respect to any plan (other than lawsuits with respect to a routine claim for benefits), and a description of the circumstances of the lawsuits or criminal actions;

(6)(i) Whether the applicant (including any person described in § 2570.34(b)(6)(ii)) or any of the parties involved in the exemption transaction has, within the last 13 years, been either convicted or released from imprisonment, whichever is later, as a result of:

(A) Any felony involving abuse or misuse of such person's position or employment with an employee benefit plan or a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime of which any of the foregoing crimes is an element; or any crime described in ERISA section 411; or

(B) Convicted by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of any crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense described in paragraph (a)(6)(i)(A) of this section and a description of the circumstances

of any such conviction in paragraph (a)(6)(i)(A) of this section or this paragraph (a)(6)(i)(B).

(ii) For purposes of this paragraph (a), a person shall be deemed to have been “convicted” from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal and regardless of whether the foreign jurisdiction considers a trial court judgment final while under appeal;

(7) Whether, within the last five years, any plan affected by the exemption transaction, or any party involved in the exemption transaction, has been under investigation or examination by, or has been engaged in litigation or a continuing controversy with, the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, the Federal Retirement Thrift Investment Board, or any other regulatory body involving compliance with provisions of ERISA, the Code, FERSA, or any other Federal or state law. If so, the applicant must provide a brief statement describing the investigation, examination, litigation or controversy. The Department reserves the right to require the production of additional information or documentation concerning any of the above matters. In this regard, a denial of the exemption application will result from a failure to provide additional information requested by the Department;

(8) Whether any plan affected by the requested exemption has experienced a reportable event under ERISA section 4043, and, if so, a description of the circumstances of any such reportable event;

(9) Whether a notice of intent to terminate has been filed under ERISA section 4041 respecting any plan affected by the requested exemption, and, if so, a description of the circumstances for the issuance of such notice;

(10) Names, addresses, phone numbers, and e-mail addresses of all parties involved in the subject transaction;

(11) The estimated number of participants and beneficiaries in each plan affected by the requested exemption as of the date of the application;

(12) The percentage of the fair market value of the total assets of each affected plan that is involved in the exemption transaction. If the exemption transaction includes the acquisition of an asset by the plan, the fair market value of the asset to be acquired must be included in both the numerator and denominator of the fraction;

(13) Whether the exemption transaction has been consummated or will be consummated only if the exemption is granted;

(14) If the exemption transaction has already been consummated:

(i) The circumstances which resulted in plan fiduciaries causing the plan(s) to engage in the transaction before obtaining an exemption from the Department;

(ii) Whether the transaction has been terminated;

(iii) Whether the transaction has been corrected as defined in Code section 4975(f)(5);

(iv) Whether Form 5330, Return of Excise Taxes Related to Employee Benefit Plans, has been filed with the Internal Revenue Service with respect to the transaction; and

(v) Whether any excise taxes due under Code section 4975(a) and (b), or any civil penalties due under ERISA section 502(i) or (l) by reason of the transaction have been paid. If so, the applicant should submit documentation (e.g., a canceled check) demonstrating that the excise taxes or civil penalties were paid;

(15) The name of every person who has authority or investment discretion over any plan assets involved in the exemption transaction and the relationship of each such person to the parties in interest involved in the exemption transaction and the affiliates of such parties in interest;

(16) Whether or not the assets of the affected plan(s) are invested, directly or indirectly, in loans to any party involved in the exemption transaction, in property leased to any party involved in the exemption transaction, or in securities issued by any party involved in the exemption transaction, and, if such investments exist, a statement for each of these three types of investments which indicates:

(i) The type of investment to which the statement pertains;

(ii) The aggregate fair market value of all investments of this type as reflected in the plan's most recent annual report;

(iii) The approximate percentage of the fair market value of the plan's total assets as shown in such annual report that is represented by all investments of this type; and

(iv) The statutory or administrative exemption covering these investments, if any;

(17) The approximate aggregate fair market value of the total assets of each affected plan;

(18) The person(s) or entity who will bear the costs of:

(i) The exemption application;

(ii) Any commissions, fees, or costs associated with the exemption transaction, and any related transaction; and

(iii) Notifying interested persons; provided, in each case, that the plan may not bear the costs of the exemption application, commissions, fees, and costs incurred to notify interested persons unless the Department determines, at its sole discretion, that a compelling circumstance exists that necessitates the payment of these expenses by the plan;

(19) Whether an independent fiduciary is or will be involved in the exemption transaction and, if so, the names of the persons who will bear the cost of the fee payable to such fiduciary; and

(20) Any prior transaction between:

- (i) The plan or plan sponsor; and
- (ii) A party involved in the exemption transaction.

(b) Each application for an individual exemption must also include:

(1) True copies of all contracts, deeds, agreements, and instruments, as well as relevant portions of plan documents, trust agreements, and any other documents bearing on the exemption transaction;

(2) A discussion of the facts relevant to the exemption transaction that are reflected in the documents listed in paragraph (b)(1) of this section and an analysis of their bearing on the requested exemption;

(3) A copy of the most recent financial statements of each plan affected by the requested exemption; and

(4) A net worth statement with respect to any party that is providing a personal guarantee with respect to the exemption transaction.

(c) Special rules for applications for individual exemption involving pooled funds are as follows:

(1) The information required by paragraphs (a)(8) through (12) of this section is not required to be furnished in an application for individual exemption involving one or more pooled funds.

(2) The information required by paragraphs (a)(1) through (7) and (13) through (19) of this section and by paragraphs (b)(1) through (3) of this section must be furnished in reference to the pooled fund, rather than to the plans participating therein. (For purposes of this paragraph (c)(2), the information required by paragraph (a)(16) of this section relates solely to other pooled fund transactions with, and investments in, parties in interest involved in the exemption transaction which are also sponsors of plans which invest in the pooled fund.)

(3) The following information must also be furnished—

(i) The estimated number of plans that are participating (or will participate) in the pooled fund; and

(ii) The minimum and maximum limits imposed by the pooled fund (if any) on the portion of the total assets of each plan that may be invested in the pooled fund.

(4) Additional requirements for applications for individual exemptions involving pooled funds in which certain plans participate are as follows:

(i) This paragraph (c)(4) applies to any application for an individual exemption involving one or more pooled funds in which any plan participating therein—

(A) Invests an amount which exceeds 20 percent of the total assets of the pooled fund; or

(B) Covers employees of:

(1) The party sponsoring or maintaining the pooled fund, or any affiliate of such party; or

(2) Any fiduciary with investment discretion over the pooled fund's assets, or any affiliate of such fiduciary.

(ii) The exemption application must include, with respect to each plan described in paragraph (c)(4)(i) of this section, the information required by paragraphs (a)(1) through (3), (5) through (7), (10), (12) through (16), and (18) and (19) of this section. The information required by this paragraph (c)(4)(ii) must be furnished in reference to the plan's investment in the pooled fund (e.g., the names, addresses, phone numbers, and e-mail addresses of all fiduciaries responsible for the plan's investment in the pooled fund (paragraph (a)(10) of this section), the percentage of the assets of the plan invested in the pooled fund (paragraph (a)(12) of this section), whether the plan's investment in the pooled fund has been consummated or will be consummated only if the exemption is granted (paragraph (a)(13) of this section, etc.).



(iii) The information required by paragraph (c)(4) of this section is in addition to the information required by paragraphs (c)(2) and (3) of this section relating to information furnished by reference to the pooled fund.

(5) The special rule and the additional requirements described in paragraphs (c)(1) through (4) of this section do not apply to an individual exemption request solely for the investment by a plan in a pooled fund. Such an application must provide the information required by paragraphs (a) and (b) of this section.

(d)(1) Generally, the Department will consider exemption requests for retroactive relief only when:

(i) The safeguards necessary for the grant of a prospective exemption were in place at the time at which the parties entered into the transaction; and

(ii) The plan and its participants and beneficiaries have not been harmed by the transaction. An applicant for a retroactive exemption must demonstrate that the responsible plan fiduciaries acted in good faith by taking all appropriate steps necessary to protect the plan from abuse, loss, and risk at the time of the transaction. An applicant should further explain and describe whether the transaction could have been performed without engaging in a prohibited transaction.

(2) Among the factors that the Department will take into account in making a finding that an applicant acted in good faith include the following:

(i) The involvement of an independent fiduciary before a transaction occurs who acts on behalf of the plan and is qualified to negotiate, approve, and monitor the transaction; provided, however, the Department may consider, at its sole discretion, an independent fiduciary's appointment and retrospective review after completion of the exemption transaction due to exigent circumstances;

(ii) The existence of a contemporaneous appraisal by a qualified independent appraiser or reference to an objective third party source, such as a stock or bond index;

(iii) The existence of a bidding process or evidence of comparable fair market transactions with unrelated third parties;

(iv) That the applicant has submitted an accurate and complete exemption application that contains documentation of all necessary and relevant facts and representations upon which the applicant relied. In this regard, the Department will accord appropriate weight to facts and representations which are prepared and certified by a source independent of the applicant;

(v) That the applicant has submitted evidence that the plan fiduciary did not engage in an act or transaction with respect to which the fiduciary should have known, consistent with its ERISA fiduciary duties and responsibilities, was prohibited under ERISA section 406 and/or Code section 4975. In this regard, the Department will accord appropriate weight to the submission of a contemporaneous, reasoned legal opinion of counsel, upon which the plan fiduciary relied in good faith before engaging in the act or transaction;

(vi) That the applicant has submitted a statement of the circumstances which prompted the submission of the application for exemption and the steps taken by the applicant with regard to the transaction upon discovery of the violation;

(vii) That the applicant has submitted a statement, prepared and certified by an independent person familiar with the types of transactions for which relief is requested, demonstrating that the terms and conditions of the transaction (including, in the case of an investment, the return in fact realized by the plan) were at least as favorable to the plan as that obtainable in a similar transaction with an unrelated party; and

(viii) Such other undertakings and assurances with respect to the plan and its participants that may be offered by the applicant which are relevant to the criteria under ERISA section 408(a) and Code section 4975(c)(2).

(3) The Department, as a general matter, will not consider requests for retroactive exemptions where transactions or conduct with respect to which an exemption is requested resulted in a loss to the plan, as determined pursuant to the facts existing at the time of the exemption application. In addition, the Department will not consider requests for exemptions where the transactions are inconsistent with the general fiduciary responsibility provisions of ERISA sections 403 or 404 or the exclusive benefit requirements of Code section 401(a).

**§ 2570.36 Where to file an application.**

The Department's prohibited transaction exemption program is administered by the Employee Benefits Security Administration (EBSA). Any exemption application governed by this subpart may be e-mailed to the Department at [e-OED@dol.gov](mailto:e-OED@dol.gov). The applicant is not required to submit a paper copy if an electronic copy is submitted. If the applicant wants to submit a paper copy of the application, it may be mailed via first-class mail to: Employee Benefits Security Administration, Office of Exemption Determinations, U.S. Department of Labor, 200 Constitution Avenue NW, Suite 400 Washington, DC 20210 or via private carrier service to Employee Benefit Security Administration, U.S. Department of Labor, Office of Exemption Determinations, 122 C Street NW, Suite 400, Washington, DC 20001-2109. The mail or private carrier service addresses, however, may be subject to change, and the applicant should confirm the address with the Office of Exemption Determinations before submitting a paper copy of an application.

**§ 2570.37 Duty to amend and supplement exemption applications.**

(a) During the Department's consideration of an exemption request, and following any grant by the Department of an exemption request, an applicant must promptly notify the Department in writing if he or she discovers that any material fact or representation contained in the application or in any documents or testimony provided in support of the

application was inaccurate at the time it was provided in support of the application. If any material fact or representation changes during this period, or if anything occurs that may affect the continuing accuracy of any such fact or representation, the applicant must promptly notify the Department in writing of the change. In addition, an applicant must promptly notify the Department in writing if it learns that a material fact or representation has been omitted from the exemption application.

(b) If, at any time during the pendency of an exemption application, the applicant or any other party who would participate in the exemption transaction becomes the subject of an investigation or enforcement action by the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, the Federal Retirement Thrift Investment Board, or any other Federal or state governmental entity involving compliance with provisions of ERISA, provisions of the Code relating to employee benefit plans, or provisions of FERSA relating to the Federal Thrift Savings Fund, the applicant must promptly notify the Department.

(c) The Department may require an applicant to provide any documentation it considers necessary to verify any statements contained in the application or in supporting materials or documents.

#### **§ 2570.38 Tentative denial letters.**

(a) If, after reviewing an exemption file, the Department tentatively concludes that it will not propose or grant the exemption, it will notify the applicant in writing, except as provided in paragraph (b) of this section. At the same time, the Department will provide a brief statement of the reasons for its tentative denial.

**Note 1 to paragraph (a).** As referenced in § 2570.33(a)(1), the Department will not hold a conference with, or issue a tentative denial letter to, an applicant who does not submit a complete application, or an applicant who does not provide current information.

(b) An applicant will have 20 days from the date of a tentative denial letter, unless the time period is extended by the Department at its sole discretion, to request a conference under § 2570.40 and/or to notify the Department of its intent to submit additional information under § 2570.39. If the Department does not receive a request for a conference or a notification of intent to submit additional information within that time, it will issue a final denial letter pursuant to § 2570.41.

**§ 2570.39 Opportunities to submit additional information.**

(a) An applicant may notify the Department of its intent to submit additional information supporting an exemption application by telephone, by letter sent to the address furnished in the applicant's tentative denial letter, or electronically to the e-mail address provided in the applicant's tentative denial letter. At the same time, the applicant should indicate generally the type of information that will be submitted.

(b) The additional information an applicant intends to provide in support of the application must be in writing and be received by the Department within 40 days from the date the Department issues the tentative denial letter unless the time period is extended by the Department at its sole discretion. All such information must be accompanied by a declaration under penalty of perjury attesting to the truth and correctness of the information provided, which is dated and signed by a person qualified under § 2570.34(b)(6) to sign such a declaration. The information may be submitted either electronically or by mail.

(c) If, for reasons beyond its control, an applicant is unable to submit all the additional information he or she intends to provide in support of his or her application within the period described in paragraph (b) of this section, he or she may request an extension of time to furnish the information. Such requests must be made before the expiration of the time period described in paragraph (b), and the request will be granted, in the Department's sole discretion, only in unusual circumstances and for a limited

period as determined by the Department. The request may be made by telephone, mail, or electronically.

(d) The Department will issue, without further notice, either by mail or electronically, a final denial letter denying the requested exemption pursuant to § 2570.41 where—

(1) The Department has not received the additional information that the applicant stated his or her intention to submit within the period described in paragraph (b) of this section, or within any additional period granted pursuant to paragraph (c) of this section; and

(2) The applicant did not request a conference pursuant to § 2570.38(b).

#### **§ 2570.40 Conferences.**

(a) Any conference between the Department and an applicant pertaining to a requested exemption will be held in Washington, DC, except that a telephone or electronic conference will be held at the applicant's request.

(b) An applicant is entitled to only one conference with respect to any exemption application. The Department may hold additional conferences at its sole discretion if it determines additional conference(s) are appropriate. An applicant will not be entitled to a conference, however, where the Department has held a hearing on the exemption under either § 2570.46 or § 2570.47.

(c) Insofar as possible, conferences will be scheduled as joint conferences with all applicants present where:

(1) More than one applicant has requested an exemption with respect to the same or similar types of transactions;

(2) The Department is considering the applications together as a request for a class exemption;

(3) The Department contemplates not granting the exemption; and

(4) More than one applicant has requested a conference.

(d) In instances where the applicant has requested a conference pursuant to § 2570.38(b) and also has submitted additional information pursuant to § 2570.39, the Department will schedule a conference under this section for a date and time that occurs within 20 days after the date on which the Department has provided either oral or written notification to the applicant that, after reviewing the additional information, it is still not prepared to propose the requested exemption or a later date at the sole discretion of the Department. If, for reasons beyond its control, the applicant cannot attend a conference within the time limit described in this paragraph (d), the applicant may request an extension of time for the scheduling of a conference, provided that such request is made before the expiration of the time limit. The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period.

(e) In instances where the applicant has requested a conference pursuant to § 2570.38(b) but has not expressed an intent to submit additional information in support of the exemption application as provided in § 2570.39, the Department will schedule a conference under this section for a date and time that occurs within 40 days after the date of the issuance of the tentative denial letter described in § 2570.38(a) or a later date at the sole discretion of the Department. If, for reasons beyond its control, the applicant cannot attend a conference within the time limit described in this paragraph (e), the applicant may request an extension of time for the scheduling of a conference, provided that such request is made before the expiration of the time limit. The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period.

(f) In instances where the applicant has requested a conference pursuant to § 2570.38(b), has notified the Department of its intent to submit additional information pursuant to § 2570.39, and has failed to furnish such information within 40 days from the

date of the tentative denial letter, the Department will schedule a conference under this section for a date and time that occurs within 60 days after the date of the issuance of the tentative denial letter described in § 2570.38(a) or a later date as determined at the sole discretion of the Department. If, for reasons beyond its control, the applicant cannot attend a conference within the time limit described in this paragraph (f), the applicant may request an extension of time for the scheduling of a conference, provided that such request is made before the expiration of the time limit. The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period.

(g) If the applicant fails to either timely schedule or appear for a conference agreed to by the Department pursuant to this section, the applicant will be deemed to have waived its right to a conference.

(h) Within 20 days after the date of any conference held under this section or a later date at the sole discretion of the Department, the applicant may submit to the Department (electronically or in paper form) any additional written data, arguments, or precedents discussed at the conference but not previously or adequately presented in writing. If, for reasons beyond its control, the applicant is unable to submit the additional information within this time limit, the applicant may request an extension of time to furnish the information, provided that such request is made before the expiration of the time limit described in this paragraph (h). The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period.

(i) The Department, at its sole discretion, may hold a conference with any party, including the qualified independent fiduciary or the qualified independent appraiser, regarding any matter related to an exemption request without the presence of the applicant or other parties to the exemption transaction, or their representatives. Any such



conferences may occur in addition to the conference with the applicant described in paragraph (b) of this section.

**§ 2570.41 Final denial letters.**

The Department will issue a final denial letter denying a requested exemption, either by mail or electronically, where:

(a) Prior to issuing a tentative denial letter under § 2570.38 or conducting a hearing on the exemption under either § 2570.46 or § 2570.47, the Department determines, at its sole discretion, that:

(1) The applicant has failed to submit information requested by the Department in a timely manner;

(2) The information provided by the applicant does not meet the requirements of §§ 2570.34 and 2570.35; or

(3) If a conference has been held between the Department and the applicant prior to the issuance of a tentative denial letter during which the Department and the applicant addressed the reasons for denial that otherwise would have been set forth in a tentative denial letter pursuant to § 2570.38;

(b) The conditions for issuing a final denial letter specified in § 2570.38(b) or § 2570.39(d) are satisfied;

(c) After issuing a tentative denial letter under § 2570.38 and considering the entire record in the case, including all written information submitted pursuant to §§ 2570.39 and 2570.40, the Department decides not to propose an exemption or to withdraw an exemption already proposed;

(d) After proposing an exemption and conducting a hearing on the exemption under either § 2570.46 or § 2570.47 and after considering the entire record in the case, including the record of the hearing and any public comments, the Department decides to withdraw the proposed exemption; or

(e) The applicant either:

(1) Asks to withdraw the exemption application; or

(2) Communicates to the Department that it is not interested in continuing the application process.

**§ 2570.42 Notice of proposed exemption.**

If the Department tentatively decides that an administrative exemption is warranted, it will publish a notice of a proposed exemption in the *Federal Register*. In addition to providing notice of the pendency of the exemption before the Department, the notice will:

(a) Explain the exemption transaction and summarize the information and reasons in support of proposing the exemption;

(b) Describe the scope of relief and any conditions of the proposed exemption;

(c) Inform interested persons of their right to submit comments to the Department (either electronically or in writing) relating to the proposed exemption and establish a deadline for receipt of such comments; and

(d) Where the proposed exemption includes relief from the prohibitions of ERISA section 406(b), Code section 4975(c)(1)(E) or (F), or FERSA section 8477(c)(2), inform interested persons of their right to request a hearing under § 2570.46 and establish a deadline for receipt of requests for such hearings.

**§ 2570.43 Notification of interested persons by applicant.**

(a) If a notice of proposed exemption is published in the *Federal Register* in accordance with § 2570.42, the applicant must notify interested persons of the pendency of the exemption in the manner and within the time period specified in the application. If the Department determines that this notification would be inadequate, the applicant must obtain the Department's consent as to the manner and time period of providing the notice to interested persons. Any such notification must include:

(1) A copy of the notice of proposed exemption as published in the *Federal Register*; and

(2) A supplemental statement in the following form:

You are hereby notified that the United States Department of Labor is considering granting an exemption from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974, the Internal Revenue Code of 1986, or the Federal Employees' Retirement System Act of 1986. The exemption under consideration is summarized in the enclosed [Summary of Proposed Exemption, and described in greater detail in the accompanying]<sup>1</sup> Notice of Proposed Exemption. As a person who may be affected by this exemption, you have the right to comment on the proposed exemption by [date].<sup>2</sup> [If you may be materially affected by the grant of the exemption, you also have the right to request a hearing on the exemption by [date].]<sup>3</sup>

All comments and/or requests for a hearing should be addressed to the Office of Exemption Determinations, Employee Benefits Security Administration, Room \_\_\_\_,<sup>4</sup> U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, ATTENTION: Application No. \_\_\_\_.<sup>5</sup> Comments and hearing requests may also be transmitted to the Department electronically at e-OED@dol.gov or at <https://www.regulations.gov> (follow instructions for submission), and should prominently reference the application number listed above. Individuals submitting comments or requests for a hearing on this matter

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<sup>1</sup> To be added in instances where the Department requires the applicant to furnish a Summary of Proposed Exemption to interested persons as described in paragraph (d) of this section.

<sup>2</sup> The applicant will write in this space the date of the last day of the time period specified in the notice of proposed exemption.

<sup>3</sup> To be added in the case of an exemption that provides relief from section 406(b) of ERISA or corresponding sections of the Code or FERSA.

<sup>4</sup> The applicant will fill in the room number of the Office of Exemptions Determinations. As of [date of publication of the final regulation], the room number of the Office of Exemption Determinations is N-5700.

<sup>5</sup> The applicant will fill in the exemption application number, which is stated in the notice of proposed exemption, as well as in all correspondence from the Department to the applicant regarding the application.

are advised not to disclose sensitive personal data, such as social security numbers or information that they consider confidential or otherwise protected.

The Department will make no final decision on the proposed exemption until it reviews the comments received in response to the enclosed notice. If the Department decides to hold a hearing on the exemption request before making its final decision, you will be notified of the time and place of the hearing.

(b) The method used by an applicant to furnish notice to interested persons must be reasonably calculated to ensure that interested persons actually receive the notice. In all cases, personal delivery and delivery by first-class mail will be considered reasonable methods of furnishing notice. If the applicant elects to furnish notice electronically, he or she must provide satisfactory proof that the entire class of interested persons will be able to receive the notice.

(c) After furnishing the notification described in paragraph (a) of this section, an applicant must provide the Department with a written statement confirming that notice was furnished in accordance with the requirements in paragraph (b) of this section. This statement must be accompanied by a declaration under penalty of perjury attesting to the truth of the information provided in the statement and signed by a person qualified under § 2570.34(b)(6) to sign such a declaration. No exemption will be granted until such a statement and its accompanying declaration have been furnished to the Department.

(d) In addition to the provision of notification required by paragraph (a) of this section, the Department, in its discretion, may also require an applicant to furnish interested persons with a brief summary of the proposed exemption (Summary of Proposed Exemption), written in a manner calculated to be understood by the average recipient, which objectively describes:

(1) The exemption transaction and the parties in interest thereto;

(2) Why such transaction would violate the prohibited transaction provisions of ERISA, the Code, and/or FERSA from which relief is sought;

(3) The reasons why the plan seeks to engage in the transaction; and

(4) The conditions and safeguards proposed to protect the plan and its participants and beneficiaries from potential abuse or unnecessary risk of loss in the event the Department grants the exemption.

(e) Applicants who are required to provide interested persons with the Summary of Proposed Exemption described in paragraph (d) of this section shall furnish the Department with a copy of such summary for review and approval prior to its distribution to interested persons. Such applicants shall also provide confirmation to the Department that the Summary of Proposed Exemption was furnished to interested persons as part of the written statement and declaration required of exemption applicants by paragraph (c) of this section.

**§ 2570.44 Withdrawal of exemption applications.**

(a) An applicant may withdraw an application for an exemption at any time by oral or written (including electronic) notice to the Department. A withdrawn application generally shall not prejudice any subsequent applications for an exemption submitted by an applicant.

(b) Upon receiving an applicant's notice of withdrawal regarding an application for an individual exemption, the Department will issue a final denial letter in accordance with § 2570.41(e) and will terminate all proceedings relating to the application. If a notice of proposed exemption has been published in the *Federal Register*, the Department will publish a notice withdrawing the proposed exemption.

(c) Upon receiving an applicant's notice of withdrawal regarding an application for a class exemption or for an individual exemption that is being considered with other applications as a request for a class exemption, the Department will inform any other applicants for the exemption of the withdrawal. The Department will continue to process other applications for the same exemption. If all applicants for a particular class

exemption withdraw their applications, the Department may either terminate all proceedings relating to the exemption or propose the exemption on its own motion.

(d) If, following the withdrawal of an exemption application, an applicant decides to reapply for the same exemption, he or she may contact the Department in writing (including electronically) to request that the application be reinstated. The applicant should refer to the application number assigned to the original application. If, at the time the original application was withdrawn, any additional information to be submitted to the Department under § 2570.39 was outstanding, that information must accompany the request for reinstatement of the application. The applicant must also update all previously furnished information to the Department in connection with a withdrawn application.

(e) Any request for reinstatement of a withdrawn application submitted, in accordance with paragraph (d) of this section, will be granted by the Department, and the Department will take whatever steps remained at the time the application was withdrawn to process the application.

(f) Following the withdrawal of an exemption application, the administrative record will remain subject to public inspection and copy pursuant to § 2570.51.

#### **§ 2570.45 Requests for reconsideration.**

(a) The Department will entertain one request for reconsideration of an exemption application that has been finally denied pursuant to § 2570.41 if the applicant presents in support of the application significant new facts or arguments, which, for good reason, could not have been submitted for the Department's consideration during its initial review of the exemption application.

(b) A request for reconsideration of a previously denied application must be made within 180 days after the issuance of the final denial letter and must be accompanied by a copy of the Department's final letter denying the exemption and a statement setting forth the new information and/or arguments that provide the basis for reconsideration.

(c) A request for reconsideration must also be accompanied by a declaration under penalty of perjury attesting to the truth of the new information provided, which is signed by a person qualified under § 2570.34(b)(6) to sign such a declaration.

(d) If, after reviewing a request for reconsideration, the Department decides that the facts and arguments presented do not warrant reversal of its original decision to deny the exemption, it will send a letter to the applicant reaffirming that decision.

(e) If, after reviewing a request for reconsideration, the Department decides, based on the new facts and arguments submitted, to reconsider its final denial letter, it will notify the applicant of its intent to reconsider the application in light of the new information presented. The Department will then take whatever steps remained at the time it issued its final denial letter to process the exemption application.

(f) If, at any point during its subsequent processing of the application, the Department decides again that the exemption is unwarranted, it will issue a letter affirming its final denial.

(g) A request for reinstatement of an exemption application pursuant to § 2570.44(d) is not a request for reconsideration governed by this section.

**§ 2570.46 Hearings in opposition to exemptions from restrictions on fiduciary self-dealing and conflicts of interest.**

(a) Any person who may be materially affected by an exemption which the Department proposes to grant from the restrictions of ERISA section 406(b), Code section 4975(c)(1)(E) or (F), or FERSA section 8477(c)(2) may request a hearing before the Department within the period of time specified in the *Federal Register* notice of the proposed exemption. Any such request must state:

(1) The name, address, telephone number, and email address of the person making the request;

(2) The nature of the person's interest in the exemption and the manner in which the person would be materially affected by the exemption; and

(3) A statement of the issues to be addressed and a general description of the evidence to be presented at the hearing.

(b) The Department will grant a request for a hearing made in accordance with paragraph (a) of this section where a hearing is necessary to fully explore material factual issues with respect to the proposed exemption identified by the person requesting the hearing. A notice of such hearing shall be published by the Department in the *Federal Register*. The Department may decline to hold a hearing where:

(1) The request for the hearing is not timely, or otherwise fails to include the information required by paragraph (a) of this section;

(2) The only issues identified for exploration at the hearing are matters of law; or

(3) The factual issues identified can be fully explored through the submission of evidence in written (including electronic) form.

(c) An applicant for an exemption must notify interested persons in the event that the Department schedules a hearing on the exemption. Such notification must be given in the form, time, and manner prescribed by the Department. Ordinarily, however, adequate notification can be given by providing to interested persons a copy of the notice of hearing published by the Department in the *Federal Register* within 10 days of its publication, using any of the methods approved in § 2570.43(b).

(d) After furnishing the notice required by paragraph (c) of this section, an applicant must submit a statement confirming that notice was given in the form, manner, and time prescribed. This statement must be accompanied by a declaration under penalty of perjury attesting to the truth of the information provided in the statement, which is signed by a person qualified under § 2570.34(b)(6) to sign such a declaration.

#### **§ 2570.47 Other hearings.**



(a) In its discretion, the Department may schedule a hearing on its own motion where it determines that issues relevant to the exemption can be most fully or expeditiously explored at a hearing. A notice of such hearing shall be published by the Department in the *Federal Register*.

(b) An applicant for an exemption must notify interested persons of any hearing on an exemption scheduled by the Department in the manner described in § 2570.46(c). In addition, the applicant must submit a statement subscribed as true under penalty of perjury like that required in § 2570.46(d).

**§ 2570.48 Decision to grant exemptions.**

(a) The Department may not grant an exemption under ERISA section 408(a), Code section 4975(c)(2), or 5 U.S.C. 8477(c)(3)(C) unless, following evaluation of the facts and representations comprising the administrative record of the proposed exemption (including any comments received in response to a notice of proposed exemption and the record of any hearing held in connection with the proposed exemption), it finds that the exemption meets the statutory requirements by being:

(1) Administratively feasible for the Department;

(2) In the interests of the plan (or the Thrift Savings Fund in the case of FERSA) and of its participants and beneficiaries; and

(3) Protective of the rights of participants and beneficiaries of such plan (or the Thrift Savings Fund in the case of FERSA).

(b) In each instance where the Department determines to grant an exemption, it shall publish a notice in the *Federal Register* which summarizes the transaction or transactions for which exemptive relief has been granted and specifies the conditions under which such exemptive relief is available.

**§ 2570.49 Limits on the effect of exemptions.**

(a) An exemption does not take effect with respect to the exemption transaction unless the material facts and representations contained in the application and in any materials and documents submitted in support of the application were true and complete.

(b) An exemption is effective only for the period of time specified and only under the conditions set forth in the exemption.

(c) Only the specific parties to whom an exemption grants relief may rely on the exemption. If the notice granting an exemption does not limit exemptive relief to specific parties, all parties to the exemption transaction may rely on the exemption.

(d) For transactions that are continuing in nature, an exemption ceases to be effective if, during the continuation of the transaction, there are material changes to the original facts and representations underlying such exemption or if one or more of the exemption's conditions cease to be met.

(e) The determination as to whether, under the totality of the facts and circumstances, a particular statement contained in (or omitted from) an exemption application constitutes a material fact or representation is made by the Department in its sole discretion.

#### **§ 2570.50 Revocation or modification of exemptions.**

(a) If, after an exemption takes effect, material changes in facts, circumstances, or representations occur, including whether a qualified independent fiduciary resigns, is terminated, or is convicted of a crime, the Department, at its sole discretion, may take steps to revoke or modify the exemption. In the event that the qualified independent fiduciary resigns, is terminated, or is convicted of a crime, the applicant must notify the Department within 30 days of the resignation, termination, or conviction, and the Department reserves the right to request that the applicant provide the Department with any of the information required pursuant to § 2570.34(e) and (f) pursuant to a time determined by the Department at its sole discretion.

(b) Before revoking or modifying an exemption, the Department will publish a notice of its proposed action in the *Federal Register* and provide interested persons with an opportunity to comment on the proposed revocation or modification. Prior to the publication of such notice, the applicant will be notified of the Department's proposed action and the reasons therefore. Subsequent to the publication of the notice, the applicant will have the opportunity to comment on the proposed revocation or modification.

(c) The revocation or modification of an exemption will have prospective effect only.

#### **§ 2570.51 Public inspection and copies.**

(a) From the date the administrative record of each exemption is established pursuant to § 2570.32(d), the administrative record of each exemption will be open to public inspection and copying at the EBSA Public Disclosure Room, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

(b) Upon request, the staff of the Public Disclosure Room will furnish photocopies of an administrative record, or any specified portion of that record, for a specified charge per page; or, at the discretion of the staff, provide the administrative record electronically for a specified charge.

#### **§ 2570.52 Effective date.**

This subpart is effective with respect to all exemptions filed with or initiated by the Department under ERISA section 408(a), Code section 4975(c)(2), and/or 5 U.S.C. 8477(c)(3) at any time on or after [date 90 days after date of publication of the final rule]. Applications for exemptions under ERISA section 408(a), Code section 4975(c)(2), and/or 5 U.S.C. 8477(c)(3) filed on or after December 27, 2011, but before [date 90 days after date of publication of the final rule], are governed by 29 CFR part 2570 (revised effective December 27, 2011).

Signed at Washington, DC, this 3rd day of March, 2022.

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**Ali Khawar,**  
*Acting Assistant Secretary,  
Employee Benefits Security Administration,  
U.S. Department of Labor.*

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